(10)

No. 88-1771-CFX
Status: GRANTED

Title: Joseph A. Bonjorno, et al., Petitioners
v.
Kaiser Aluminum & Chemical Corporation, et al.

Docketed:
April 28, 1989

Court: United States Court of Appeals
for the Third Circuit

Vide:
88-1595

Counsel for petitioner: Reath,Henry T.

Counsel for respondent: McElroy,Richard P., Perry,David L.

Entry	Date	Note	Proceedings and Orders
1	Mar 28 1989	D	Application (A88-787) for an order modifying the stay entered by the United States Court of Appeals for the Third Circuit, submitted to Justice Brennan.
2	Mar 29 1989		Application (A88-787) denied by Justice Brennan.
3	Apr 1 1989		Response to application (A88-787) filed by Kaiser Aluminum & Chemical Sales, Inc., et al..
4	Apr 28 1989	G	Petition for writ of certiorari filed.
5	May 26 1989		Brief of respondents Kaiser Aluminum, et al. in opposition filed.
6	May 30 1989		DISTRIBUTED. June 15, 1989
7	Jun 3 1989	X	Reply brief of petitioners Bonjorno, et al. filed.
8	Jun 19 1989		Petition GRANTED. The case is consolidated with 88-1595, and a total of one hour is allotted for oral argument. **********
9	Aug 2 1989		Brief of petitioners Bonjorno, et al. filed.
10	Aug 2 1989		Joint appendix filed. VIDED.
12	Aug 28 1989		Record filed.
		*	Certified copy of original record, 8 boxes, received.
11	Sep 1 1989		Brief of respondents Kaiser Aluminum & Chemical Corp., et al. filed.
13	Sep 26 1989		SET FOR ARGUMENT MONDAY, DECEMBER 4, 1989. (CONSOLIDATED WITH NO. 88-1595) (2ND CASE)
14	Sep 29 1989		CIRCULATED.
15	Sep 30 1989	X	Reply brief of petitioners Bonjorno, et al. filed.
17	Nov 6 1989	D	Motion of respondents /cross-petitioners Bonjorno, et al. to open oral argument and to present a summary outline of issues for use in determining the order of oral argument filed.
18	Nov 16 1989		Opposition of petitioners to motion of respondents Cross petitioners Bonjourno, et al. filed.
19	Nov 27 1989		Motion of respondents /cross-petitioners Bonjorno, et al. to open oral argument and to present a summary outline of issues for use in determining the order of oral argument DENIED.
20	Dec 4 1989		ARGUED.

1PP

88- 1771

No. _____

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), AND BARBARA K. CLISBY,

Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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40 pp

STATEMENT OF QUESTIONS PRESENTED ON CROSS-PETITION

In an antitrust action to recover treble damages from a monopolist predator that destroyed Plaintiffs' business:

1. Considering:

¶ the extraordinary circumstances of delay, and the diminution in the time value of money suffered by Plaintiffs, (who were the victims of intentional, predatory, monopolistic conduct by Defendants,) and

¶ the benefit obtained by the predatory Defendants from the time value of money they retained,

Did not the Court of Appeals, in awarding interest to Plaintiffs, as the prevailing party, possess inherent equitable power and authority under 28 U.S.C. § 1912 and the second sentence of Fed. R. App. P. 37 to fashion remedies and do justice as between the parties by awarding Plaintiffs interest to cover their actual loss of the time value of money at market rates (i.e., monthly average prime rates, compounded monthly from August 1979 until full payment of all amounts due), which would amount to more than $17 million; and

Did not the Court below err as a matter of law in only awarding interest at the Federal T-bill rate (some 2 to 3 points below prime) pursuant to 28 U.S.C. § 1961, as amended, which would return to Plaintiffs only some $8.3 million or $12 million of interest, depending on how the district court on remand interprets and applies the correct method of calculating interest and setting the interest rate.

2. Should not the award of interest on Plaintiffs' judgment begin to run as of the date liability was fixed in August of 1979—and not as decided by the Court below, as of December 2, 1981 (when the damages were fixed) where:

- ¶ the verdict and judgment as to liability were never disturbed; and
- ¶ that judgment of liability was accompanied by a money judgment in the amount of $5.4 million, which was subsequently increased to $9,567,939 on a re-trial, limited to damages only, that had been requested by the defendants; and
- ¶ the damages awarded by the jury in both damage trials were measured in dollars valued as of May 1977, with no accounting for interest or diminution in the time value of money from August 1979 (the original judgment date) to December 2, 1981 (the verdict date on recalculation of damages).

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Cross-Petitioners Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.) and Barbara K. Clisby ("Plaintiffs"), are the former shareholders and trustees in liquidation of the original Plaintiff below: Columbia Metal Culvert Company of Vineland, New Jersey. Pursuant to Supreme Court Rule 28.1, Plaintiffs state that they have no other corporate affiliations.

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BONJORNO TIME LINE

1972 Kaiser's threat to drive Columbia out of business

1973 Kaiser opens plant near Columbia's plant and hires away Columbia's best salesman, Robert Kennedy

1/7/74 Complaint filed

1974 Price Squeeze

1975 Kaiser's conduct causes Columbia to stop producing pipe

5/2/77 First Trial, Directed Verdict

5/31/77 Cutoff date for damages

5/24/78 Court of Appeals reverses directed verdict and remands for trial

1978 Columbia's plant sold to third party

8/16/79 Trial and Liability Verdict

8/21/79 First Damage Verdict

8/22/79 *Money Judgment Entered $5.4mm

6/17/81 District Court grants new trial on damages

12/2/81 Second Jury Verdict on Damages

12/4/81 *Judgment Entered $9.6mm

1981 Kaiser purchases Columbia's plant

10/1/82 Effective Date of 28 U.S.C. Section 1961 as amended

1/18/83 *District court grants partial NOV, judgment $4.7mm

12/27/84 *Court of Appeals affirms liability, vacates judgment NOV and reinstates $9.6mm damage judgment

6/6/85 Kaiser petition for certiorari

6/23/86 U.S. Supreme Court denies cert. petition

7/1/86 Court of Appeals issues mandate

7/3/86 Kaiser pays $9,567,939 to Plaintiffs

4/11/88 District Court Awards interest $2,632,886

1/9/89 Court of Appeals Judgment Awarding Interest at T-bill ra

1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989

*denotes the various "judgments" entered in this case

OPINIONS BELOW

This complex and protracted treble damage antitrust action has its genesis in a Complaint filed in January 1974.[1] The Judgment and Opinion of the Court of Appeals dated January 9, 1989, awarding interest on the treble damage judgments are reported at 865 F.2d 566, and are reproduced at Pet. A-1 and Pet. A-3, respectively.[2] The Opinion of the United States District Court for the Eastern District of Pennsylvania dated April 11, 1988, is reproduced at Pet. A-31.

This Court has already denied certiorari twice on the substantive issues underlying the interest issues in this case. The Opinion of the Court of Appeals on the merits of the antitrust claim, dated December 27, 1984, is reported at 752 F.2d 802 (*cert. denied*, 477 U.S. 908 (1986)). The Opinions of the District Court on the merits of the antitrust claim are reported at 518 F. Supp. 102 (1981) and 559 F. Supp. 922 (1983). The Opinion of the Court of

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[1] Attached in the Appendix to this Cross-Petition, and reproduced for the convenience of the Court on the opposite page, is a document entitled "Bonjorno Time Line" which succinctly identifies the principal opinions and events in the extraordinary history of this complex and protracted case.

[2] References to the Appendix of Original Petitioners (Kaiser) in No. 88-1595 are set forth as "Pet. A—," while references to the Appendix to this Cross-Petition are set forth as "Cross-Pet A—."

Appeals in an earlier appeal decided on May 24, 1978, is reported at 579 F.2d 20 (*cert. denied,* 439 U.S. 876 (1978)).

———o———

JURISDICTION

The judgment of the Court of Appeals on postjudgment interest was entered on January 9, 1989. Cross-petitions for rehearing and rehearing *in banc* were denied by Order dated February 13, 1989. Pet. A-29. Circuit Judge Stapleton dissented from denial of rehearing *in banc* for the reason set forth in his dissent to the judgment of the panel. Circuit Judges Becker and Hutchinson dissented from the denial of rehearing *in banc,* but did not specify whether they were disposed in favor of the contentions raised in Plaintiffs' Petition for Rehearing or Kaiser's Petition for Rehearing. Pet. A-30. Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser") filed and served a Petition for a Writ of Certiorari on March 30, 1989. No. 88-1595. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 19.5.

Plaintiffs' Counsel received Kaiser's petition for certiorari on March 30, 1989.

STATUTES INVOLVED

The award of interest in this case involves interpretation of 28 U.S.C. § 1961, as amended effective October 1, 1982, which provides in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such Court is held, execution may be levied for interest on judgments recovered in the Courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> (b) Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

Also relevant to the issues in this Cross-Petition is 28 U.S.C. § 1912, which provides:

> Where a judgment is affirmed by the Supreme Court or a Court of Appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

This case also involves application of the second sentence of Federal Rule of Appellate Procedure 37, titled "Interest on Judgments." The Rule in its entirety provides:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the District Court. If the judgment is modified, or reversed with a direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to allowance of interest.

———o———

I. PRELIMINARY STATEMENT

It has been more than fifteen years since Kaiser, a giant monopolist, began its predatory action that ultimately destroyed Plaintiffs' small but successful family business, culminating in the only liability verdict and first damage judgment in August 1979, and the recalculated damage judgment in 1981 of more than $9.5 million.

Plaintiffs are gratified that the Court below repudiated Kaiser's obscene position that it owed only two days interest for a total of $1,223. Similarly, they are gratified that the Court below reversed the district court's award of some $2.6 million based on simple six percent interest under Pennsylvania law.

On the other hand, Plaintiffs regret that the Court of Appeals failed to award them the full measure of market rate interest (some $17 million), which they should recover, just to preserve their damage award against diminution over time; and to force the wrongdoer, Kaiser, to disgorge its ill-gotten, unjust enrichment, at Plaintiffs' expense, in a similar amount.

Notwithstanding their desire to see full justice done, and to carry out the policy set forth in the federal antitrust laws, the Plaintiffs, after more than 15 years of hard-fought litigation, wish to put to an end this seemingly endless dispute so they can get on with their businesses and lives. Thus Plaintiffs are willing to accept the Court of Appeals' decision if they can now promptly and without further litigation enjoy in some measure the benefits to which a jury of their peers determined they were entitled—albeit, benefits significantly reduced because they will not have received full market interest for the full time period after entry of judgment in their favor.

Thus, for the reasons stated in their Brief in Opposition to Kaiser's Petition for Certiorari (filed concurrently with this Cross-Petition), Plaintiffs respectfully request this Court deny Kaiser's Petition for Certiorari. Only if the Court should grant Kaiser's Petition, do Plaintiffs request that the Court grant this Cross-Petition for Certiorari as to the issues presented by Plaintiffs.

This Court should not allow a predatory monopolist to reap the benefits of its monopoly and retain the benefits of 10 years worth of interest on a multi-million-dollar judgment, over a period when interest rates in the private market peaked at prime rates over 20%, and when the Plaintiffs, due to Kaiser's conduct, were forced to borrow money at three percentage points above the prime rate. Kaiser's intentional predatory conduct in destroying Plaintiffs' family business is the most egregious and reprehensible type of conduct prohibited by the antitrust laws. By arguing for an inadequate rate and time period of postjudgment interest, Kaiser seeks to pay off the entire $9.5 million judgment out of the $17 million profit it has earned (at Plaintiffs' expense) from the use of Plaintiffs' money, and still turn a handsome profit from its conduct, notwithstanding the condemnation of that conduct by the jury and the Courts.

The Plaintiffs file this Cross-Petition for Certiorari to preserve their right to present argument to this Court on:

(1) the failure of the Court below to recognize the power and legal authority to award in this unusual case monthly average prime rates compounded monthly—rather than the T-bill rate under 28 U.S.C. § 1961, which is historically several points below prime, and which only establishes the minimum interest for routine judgments in the District Court that do not involve, as in this case, long and protracted appeals; and

(2) the wrongful denial by the Court of Appeals of almost 2½ years interest on the judgment, which was first entered against Kaiser in August 1979.

The undisputed facts summarized below demonstrate the rightness and justice of Plaintiffs' claim:

¶ Kaiser, which the jury found to have intentionally and willfully monopolized the market for fabricated aluminum culvert pipe, engaged in systematic predatory conduct which destroyed Plaintiffs' family business. By delaying its ultimate day of reckoning in having to pay its full liability on the judgment, Kaiser, the predatory monopolist, has reaped the benefits of delay, according to market rates, in an amount in excess of $17 million.

¶ Similarly, during this same period, the Plaintiffs (who were not awarded any prejudgment interest) were deprived of the full value of the benefit of their judgment of liability from August 1979 to date by a similar amount—in excess of $17 million.

¶ The Court should not allow the foregoing inequity go unremedied.

———o———

II. STATEMENT OF THE CASE

A. Kaiser's Predatory Destruction Of Plaintiffs' Business And Monopolization Of The Market For Fabricated Aluminum Culvert Pipe

On the merits of the underlying dispute, Kaiser, a large international corporation, was found liable for deliberately destroying Plaintiffs' relatively small competing business, Columbia Metal Culvert Co., Inc. ("Columbia"). 752 F.2d 802. *See* Bonjorno Time Line, Cross-Pet. A-1. In January 1974, Columbia filed its Complaint to seek re-

dress under the antitrust laws. By May 1977, when this case originally went to trial, Kaiser had effectively driven Columbia out of business. The first trial in 1977 resulted in a directed verdict in favor of Kaiser, which was reversed by the Court of Appeals, holding that Plaintiffs presented proper evidence showing intentional, predatory conduct in violation of the antitrust laws. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 31 (3d Cir. 1978). This Court denied Kaiser's Petition for certiorari. *Kaiser Aluminum & Chemical Corp. v. Columbia Metal Culvert Co., Inc.*, 439 U.S. 876 (1978).

In August 1979, in a retrial on remand, the jury found that Kaiser monopolized the market for fabricated aluminum culvert pipe, and destroyed Plaintiffs' business. On August 22, 1979, a judgment was entered in favor of Plaintiffs and against Kaiser in the trebled amount of $5,445,000. After waiting almost two years before ruling on Kaiser's post-trial motions, the District Court denied Kaiser's Motion for a Judgment Notwithstanding the Verdict, affirmed the liability finding, but granted Kaiser's alternative request for a new trial limited to damages only. 518 F. Supp. 102 (E.D. Pa. 1981).

On December 2, 1981, the jury rendered its verdict in the retrial on damages, which was based on the facts as determined by the first jury in 1979. Notwithstanding Plaintiffs' counsel's request on December 2, 1981 that judgment be entered forthwith on the verdict amount trebled, the District Court waited two days before entering judgment in the trebled amount of $9,567,939. Although the 1981 jury awarded higher damages than the 1979 jury,

there was no increase in the amount of damages at the second trial to account for the time value of money between the original August 1979 judgment and the subsequent December 1981 judgment. Plaintiffs' proof as to damages in both trials was based on valuations as of May 1977.

After waiting more than another year to decide Kaiser's post-trial motions following the 1981 trial, the District Court on January 17, 1983 granted, in part, Kaiser's Motion for Judgment Notwithstanding the Verdict, reduced the amount of the judgment from $9,567,939 to $4,651,560, and entered a final appealable judgment. On cross-appeals, after almost two year's delay, the Third Circuit reinstated the full judgment in the amount of $9,567,939. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984). This Court denied Kaiser's petition for certiorari. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 477 U.S. 908 (1986).

After the parties stipulated that the District Court should consider the issue of the appropriate amount of interest in the first instance, the Court of Appeals issued its mandate on July 1, 1986, and Kaiser paid Plaintiffs $9,567,939 on July 3, 1986.

B. Kaiser Has Obtained The Benefits Of Delay, And The Value Of Plaintiffs' Judgment Has Been Severely Diminished Due To Loss Of The Time Value Of Money

Plaintiffs' damages were valued as of May 31, 1977. *See* 559 F. Supp. at 930-38. Plaintiffs did everything in their power to bring this case to trial promptly, but through

no fault of Plaintiffs, they were not able to obtain a judgment in their favor against Kaiser until the second trial in August 1979.[3]

The District Court delayed for nearly two years before deciding Kaiser's post-trial motions, thereby delaying the Plaintiffs' recovery. Ultimately on the retrial on damages in 1981, the 1981 jury emphatically reaffirmed the result reached by the first jury in August 1979, granting even higher damages than the 1979 jury had awarded.

Kaiser sought to benefit from this delay, by its contention that Plaintiffs were not entitled to any interest over the period of delay caused by Kaiser's own post-trial motions. The liability finding by the jury in August 1979, and liability judgment entered on that finding, have never been altered by the District Court, the Court of Appeals or this Court, and formed the basis for the damages ultimately assessed.

On December 2, 1981, the jury fixed Plaintiffs' damages at an amount that was trebled to $9,567,939, based upon calculations of damages made as of May 1977. There is no increment in the amount of damages assessed in 1981 to account for the time delay or the time value of money from August 1979 through December 1981. Accordingly, Plaintiffs should be entitled to postjudgment interest over that period. *See Handguards, Inc. v. Ethi-*

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[3] Kaiser was able to convince the District Court, incorrectly, to grant a directed verdict in 1977, which was reversed in the 1978 appeal to the Third Circuit. *Columbia Metal*, 579 F.2d at 31; *see also Columbia Metal Culvert Co. v. Kaiser Industries Corp.*, 526 F.2d 724 (3d Cir. 1975) (pretrial jurisdictional appeal).

con, Inc., 743 F.2d 1282, 1299-1300 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).

Moreover, the time over which Kaiser delayed its ultimate day of reckoning was a time of abnormally high interest rates, with the prime rate peaking over 20% during the relevant period. Measured at monthly average prime rates, compounded monthly, interest on $9,567,939 from August 1979 through the date of the briefs filed with the Court of Appeals (June 13, 1988) accounting for Kaiser's payment of $9,567,939 on July 3, 1986, would result in interest due as of that date of an amount in excess of $17 million, with interest continuing to accrue at a rate of approximately $4,250 per day. Kaiser, as a predatory monopolist, should not be permitted to retain any portion of the windfall benefits it received by delay in collection of the judgment.

C. The Judgment Of The Court Of Appeals

In determining the appropriate interest on Plaintiffs' judgment on the merits, the Court of Appeals:

(1) denied as " without merit,"[4] Plaintiffs' request that interest be calculated at monthly average

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[4] The Court of Appeals rejected Plaintiffs' position on this issue in one sentence with no discussion:

> We have considered Bonjorno's argument that a "market rate" of interest should apply; however, we find the argument to be without merit.

865 F.2d at 572, n.10, Pet. A-14 n.11 From the Court of Appeals discussion of 28 U.S.C. § 1961, rejection of Plaintiffs' argument must have been based on the Court of Appeals' perception that it lacked the power to make such an award, and felt bound by the provisions of the federal interest statute, 28 U.S.C. § 1961, which by its terms applies to district court judgments.

prime rates, compounded monthly, from August 1979, which would have resulted in an award of interest in excess of $17 million;

(2) denied Plaintiffs' request that interest should date back to August 1979, and instead held that interest should begin to run as of December 2, 1981, the date of the verdict on the retrial on damages;

(3) rejected Kaiser's contention that interest should only run from the date of issuance of the Court of Appeals mandate on July 1, 1986, reinstating the jury's December 2, 1981 damage award;

(4) rejected, without comment, Kaiser's contention that postjudgment interest should accrue only on pre-trebled damages, rather than the amount of the judgment;

(5) held that, on the narrow facts of this case, application of current law, which has now been in effect for over six years, does not result in manifest injustice, and therefore the amount of interest is determined by the current version of 28 U.S.C. § 1961, rather than the version repealed by Congress over six years ago.

Thus, the Court of Appeals denied Plaintiffs interest over the period between the first judgment and the second judgment, which effectively took away from the injured Plaintiffs, and granted to the predatory monopolist, the benefit of 2-½ years interest on a multimillion dollar judgment. The Court of Appeals denial of 2-½ years interest was contrary to precedent in a number of other Circuits and even contrary to precedent within its own court.

The Court of Appeals also denied Plaintiffs' request for interest at market rates that would accurately measure the time value of money, apparently on the basis that it

was constrained by the rate set forth in 28 U.S.C. § 1961 for calculation of interest by the clerk's office in execution on district court judgments in run-of-the-mill cases. This Court should reaffirm the power of the Court of Appeals under 28 U.S.C. § 1915 and Fed. R. App. P. 37 to do justice as between the parties and fashion equitable remedies for awards of interest that will prevent diminution in the value of judgments inherent in the appeals process, and to award market interest in exceptional cases such as the present one.

Accordingly, Plaintiffs respectfully request that this Court grant their Cross-Petition, in the event it grants certiorari on Kaiser's Petition.

—o—

III. REASONS FOR GRANTING PLAINTIFFS' CROSS-PETITION

Summary

¶ Plaintiffs have unjustly been denied almost two and a half years of interest, and have been denied full market rate interest, while Defendant (the wrongdoer, monopolist predator that destroyed Plaintiff's small family business) has been unjustly enriched by an amount equal to Plaintiffs' loss.

¶ It is contrary to public policy, as clearly articulated by the Congress in fashioning the antitrust laws, that a monopolist predator, as the undisputed wrongdoer, should be able to avoid paying market rate interest for the entire period and avoid paying any interest at all for two and a half years, to the wronged party on a damage award, particularly where the delay was caused by Defen-

dants' post trial motions and the lower court's delay in ruling on Defendants' motions.

¶ This Court should reaffirm that interest runs from the date liability is fixed and the first damage judgment is entered—not from the date of recalculation of damages without accounting for delay. Furthermore, any doubt as to which rule to follow should be resolved in favor of the wronged, and against the adjudicated wrongdoer, whose conduct caused the uncertainty. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

¶ This Court should reaffirm the power of the Courts of Appeals to award interest on its judgments at market rates sufficient to preserve the value of the award against diminution due to loss of the time value of money.

1. The Equities In This Case And Policy Considerations Underlying Interest Awards Require That Plaintiff Receive Full Market Rates

The basic purpose of court-awarded interest is to preserve the value of the judgment against diminution due to loss in the time value of money. *See* Note, *Interest on Judgments in the Federal Courts*, 64 YALE L.J. 1019 (1955).[5] The innocent plaintiff should not suffer a di-

[5] In 1873, this Court held that "the creditor is entitled to interest . . . by way of compensation for the delay in payment." *Young v. Godbe*, 82 U.S. 562, 565 (1873); *see also United States v. United Drill & Tool Corp.*, 183 F.2d 998, 999 (D.C. Cir. 1950) ("in equity interest is allowed as a means of compensating a creditor for loss of use in his money"). *See generally* S. Homer, *A History of Interest Rates* (2d Ed. 1977); *Marshall v. Beeler*, 104 Kan. 32, 178 P. 245, 246 (1919) (discussing interest in the courts).

minution in the value of the judgment due to loss of the time value of money while the wrongdoing defendant delays payment by pursuing postjudgment relief in the courts. Moreover, the wrongdoing defendant should not be entitled to retain the benefits of the time value of money over the period of delay from entry of the original judgment until ultimate collection of the amounts due.

The foregoing policy concerns are particularly important in the present case, in which Kaiser engaged in intentional predatory conduct destroying Plaintiffs' family business. *See Columbia Metal*, 579 F.2d at 31. The policies of the antitrust law and the policies behind court-awarded interest coincide in the case at bar to mandate a full award of interest sufficient to preserve the value of the judgment.

The Court of Appeals erred in failing to recognize its power and carry out its duty to award interest at full market rates to preserve the value of the judgment against diminution due to loss of the time value of money. Specifically, the Court erred in holding that Plaintiffs' interest award must be based solely on 28 U.S.C. § 1961, which merely establishes the minimum amount of interest required on all district court judgments and provides an easy method for the district court clerk's office to calculate interest to allow parties to execute on the judgment amount plus interest. By improperly treating the minimum interest mandated by 28 U.S.C. § 1961 as a maximum limit on the interest award, the court below ignored its larger duty to do justice between the parties and to preserve the value of the judgment.

In the present case, interest on the judgment for the full period amounts to more than $17 million. This is the measure of Kaiser's gain through delay, and the corresponding true loss to the Plaintiffs.

Market rate interest is an accurate measure of the diminution in the value of the judgment. By contending that it is only liable for two days of interest, Kaiser is attempting to effectively de-treble the treble damage award in the present case. Rather than paying the judgment amount ($9.5 million) plus market interest ($17 million) which totals almost $27 million, Kaiser seeks to pay only the judgment amount, which is approximately 1/3 of the total of the judgment amount plus market interest. That inequity should not be tolerated. This Court should reaffirm the power of the Court of Appeals to fully preserve the value of the judgment by awarding market interest in exceptional cases such as the present one.

2. The Courts Have Authority To Preserve The Value Of A Judgment By Awarding Interest At Full Market Rates

As we demonstrate below, where the final decision of a lower court is delayed because of the appeal process, the Court of Appeals has the inherent equitable power to award sufficient interest to preserve the value of the judgment, regardless of the minimum interest mandated by 28 U.S.C. § 1961. Moreover, the Court of Appeals' inherent equitable power to award adequate and full market rate interest was codified as early as the Judiciary Act of 1789, which empowered the Supreme Court and Circuit Courts to award "just damages for . . . delay" upon affirmance of a judgment or decree. Judiciary Act of 1789,

ch. 20, Sec. 23, 1 Stat. 73, 85 (current version codified at 28 U.S.C. § 1912). Federal Rule of Appellate Procedure 37, adopted in 1968, also explicitly grants the Courts of Appeals discretion and power to award sufficient interest to preserve the value of the judgment.

In *National Bank of Commerce of New York v. Mechanics National Bank,* 94 U.S. 437, 439 (1876), this Court recognized the equitable power of the courts to award interest under equitable principles beyond the specific interest mandated under a strict reading of 28 U.S.C. § 1961. This Court has long recognized the courts' power to award interest based on sources other than 28 U.S.C. § 1961. *See Perkins v. Fourniquet,* 55 U.S. (14 How.) 328, 330-34 (1853); *Mitchell v. Harmony,* 54 U.S. (13 How.) 115, 147-49 (1851); *Boyce's Executioners v. Grundy,* 34 U.S. (9 Pet.) 275, 289 (1835).

In *Perkins v. Fourniquet,* the Court held that Fourniquet was entitled to interest over the period the case was on appeal to the Supreme Court as determined by the Supreme Court pursuant to this Court's Rules adopted under section 23 of the Judiciary Act of 1789, rather than interest as provided under state law incorporated for district and circuit court judgments under the former version of 28 U.S.C. § 1961—the act of 1842.[6]

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[6] In *Perkins,* this Court stated:

> The act of 1842 [predecessor to 28 U.S.C. § 1961] does not embrace cases in equity; nor does it extend to either judgments or decrees, in this court. It is confined, in plain terms, to judgments at law, in the circuit and district courts. . . . Upon common-law prin-

(Continued on following page)

The act of 1842, as currently amended and codified in 28 U.S.C. § 1961, applies by its terms only to judgments "in a district court." By contrast, interest on cases before the Courts of Appeals is governed by the current codification of section 23 of the Judiciary Act of 1789 at 28 U.S.C. § 1912, and by Federal Rule of Appellate Procedure 37, adopted in 1968. These provisions wisely give the Courts of Appeals discretion in setting the appropriate interest awards in cases appealed to those courts. This discretionary power coexists with and supplements the power to award minimum interest pursuant to 28 U.S.C. § 1961. *See Brock v. Richardson,* 812 F.2d 121 (3d Cir. 1987) (equitable power to award postjudgment interest); *see also Smith v. National Railroad Passenger Corp.,* 856 F.2d 467 (2d Cir. 1988) (adoption of Fed. R. App. P. 37 grants power to award interest for period prior to issuance of mandate and supersedes contrary caselaw).

Although Courts of Appeals have generally been guided by the interest provisions of 28 U.S.C. § 1961 in

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(Continued from previous page)

> ciples a judgment does not carry interest. It is true, that damages may be recovered for the detention of the debt, in an action on the judgment. But previous to the act of 1842, neither interest nor damages, for the detention of the debt, could have been levied under process of execution, upon the judgment of a circuit or district court of the United States.
>
> *But the act of 1842, does not speak of interest or damages upon the judgments of this court,* nor does it repeal the 23d section of the act of 1789 [predecessor to 28 U.S.C. 1912]. This section provides, that when a judgmet or decree is affirmed here, this court is directed to adjudge or decree to the respondent in error, just damages for his delay, and single or double costs, at their discretion.

55 U.S. (14 How.) at 331 (emphasis added).

determining the time period and the rate of interest, they, quite properly, have not felt constrained to limit interest awards to the minimum amount of interest mandated by that statute. Instead, they have generally employed equitable principles in determining the appropriate amount of interest in any given case in order adequately to preserve the value of the judgment against diminution due to loss in the time value of money. *See, e.g., Poleto v. Consolidated Rail Corp.,* 826 F.2d 1270 (3d Cir. 1987); *Turner v. Japan Lines, Ltd.,* 702 F.2d 752 (9th Cir. 1983); *Louisiana & Ark. Ry. Co. v. Pratt,* 142 F.2d 847 (5th Cir. 1944).

Although the Courts of Appeals generally have employed equitable principles to *extend the time period* of the interest award beyond the specific time established by a narrow reading of the statute, some courts have also exercised equitable discretion in setting the *rate of interest,* notwithstanding the rate specified in 28 U.S.C. § 1961.[7]

Moreover, even the Court of Appeals for the Third Circuit has recognized the court's discretion to set an adequate postjudgment interest rate, where the court's equitable power rather than 28 U.S.C. § 1961 forms the basis for the award of postjudgment interest. *Brock v. Richardson,* 812 F.2d 121, 126 (3d Cir. 1987); *cf. Devex Corp.*

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[7] For example, in *Northern Natural Gas Co. v. Hegler,* 818 F.2d 730, 738 (10th Cir. 1987), the Court of Appeals affirmed the District Court's exercise of discretion in setting reasonable rates for postjudgment interest following entry of the original judgment and remand on appeal, stating:

> It is apparent that commercial rates increased greatly during this period and the trial court had discretion to keep the rates *in accordance with the real world.* (emphasis supplied).

v. General Motors Corp., 749 F.2d 1020, 1024 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985) (applying higher rate in amended Delaware law, notwithstanding contrary declaration by Delaware legislature, in order to advance "the policy underlying 28 U.S.C. § 1961: compensation of the wronged party for loss of the use of money, in a changing economy . . . [reflecting] changes in the value of the use of money"); *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981) (prejudgment interest at market rates); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1479-80 (3d Cir.) (prejudgment interest), *cert. denied*, 109 S.Ct. 273 (1988); *Green v. USX Corp.*, 843 F.2d 1511, 1530 & n.16 (3d Cir. 1988) (prejudgment interest).

In sum:

1. The Court of Appeals has the power to award sufficient interest to preserve the value of the judgment.

2. If the minimum interest mandated under 28 U.S.C. § 1961 does not satisfy that goal, the court may, and in this case respectfully should, award market rate interest sufficient to preserve the value of the judgment.

3. The Plaintiffs have been denied the full benefits of market rate interest, which has resulted in serious diminution in the value of their judgment.

4. The Court should not allow this inequity to go unremedied, particularly in light of Kaiser's egregious intentional, predatory conduct destroying Plaintiff's business, and the measurement of Plaintiffs' damages in 1977 dollars.

Accordingly, Plaintiffs request that if certiorari is granted on Kaiser's petition, this Cross-Petition also

should be granted to clairfy the power of the Court of Appeals to award market interest sufficient to preserve the value of the judgment against diminution due to loss in the time value of money, notwithstanding the minimum interest mandated under 28 U.S.C. § 1961.

3. It Is Against Public Policy To Encourage Appeals And Delay In Litigation Where The Losing Party Can Still Profit From Use Of The Winner's Money At Rates Considerably Below The Losing Party's Cost Of Money

Unless the Court reaffirms the power of the federal courts to award full market interest in exceptional cases such as the present case, litigants may be encouraged to go out of their way to relitigate issues on post-trial motions and on appeals and petitions for certiorari, simply to receive the benefit of the time value of money. Congress was concerned with the problem of discouraging unwarranted appeals when it amended 28 U.S.C. § 1961 in 1982 to abolish the divergent and inadequate state law rates of interest applicable under the earlier version of the statute. *See* S. Rep. No. 97-275, 97th Cong. 2d Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21:

> Under current law, the interest rate on judgments in the Federal courts is based on varying State laws and frequently falls below the contemporary cost of money. Part B of Title III sets a realistic and nationally uniform rate of interest on judgments in the Federal courts that would be keyed to the *prime interest rate* as determined by the Internal Revenue Service. *This eliminates an economic incentive which exists today for a losing defendant to appeal a judgment and accumulate interest on the judgment award at the commercial rate during the pendency of the appeal.* (emphasis added).

Although the original proposal for amendment of 28 U.S.C. § 1961 provided for interest at prime rate on all cases, the provision was changed to the federal T-bill rate, at the request of the then Budget Director David Stockman, who requested on behalf of the United States that the postjudgment interest rate not exceed the cost of money of the federal government. *See Campbell v. United States,* 809 F.2d 563, 574-75 (9th Cir. 1987) (discussing Stockman's request to modify proposed rate). The cost of money for private parties, however, is measured by prime interest rates, and the policy concerns noted in the Senate report mandate recognition of that fact in exceptional cases such as the present case.

By failing to award interest back to the original judgment in August 1979, and failing to award interest at market rates, the Court of Appeals' decision allows Kaiser to profit by its post-trial motions, even though it ultimately and repeatedly lost before the jury, the district court and the Court of Appeals. This result is contrary to public policy in that it unduly encourages parties to relitigate issues through post-trial motions and appeals.

4. Plaintiffs Were Improperly Denied 2½ Years Of Interest

(a) Postjudgment Interest Runs From The Date Of The Original Judgment Establishing Liability And Calculating Damages Unless Subsequent Recalculation Of Damages Accounts For The Time Value Of Money After That Date

The Third Circuit's holding denying interest between the original judgment of August 1979 and the retrial on

damages in December 1981 is plainly in error and contrary to legal principles recognized by many other courts. Plaintiffs' damages were valued as of May 31, 1977. At a bare minimum, they should be entitled to postjudgment interest at least from the August 22, 1979 judgment in their favor.

The General Rule

In *Handguards, Inc. v. Ethicon, Inc.,* 743 F.2d 1282, 1299-1300 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985), the Ninth Circuit upheld a District Court award of postjudgment interest in an antitrust case for the period between an original judgment and a new judgment on retrial on damages, in circumstances similar to those in the present case.[8] The Ninth Circuit held:

> Where . . . [interest for the period between two judgments] has not been included in damages, it can be recovered as postjudgment interest.

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[8] The Ninth Circuit affirmed the District Court's award of postjudgment interest on the lower principal amount of the first judgment, with the principal amount stepped up to the higher amount of the subsequent judgment as of the date of its entry. *See Handguards, Inc. v. Ethicon, Inc.,* 552 F. Supp. 820, 821-22 (N.D. Cal. 1982), *aff'd,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985).

A similar step-up of principal was endorsed by the Sixth Circuit in *Bailey v. Chattem, Inc.,* 838 F.2d 149, 154 (6th Cir. 1988), *cert. denied,* 108 S. Ct. 2831 (1988).

A number of courts, however, hold that interest runs from the date of the original judgment on the principal amount subsequently established. *See, e.g., Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897, 927 (3d Cir. 1985); *Copper Liquor, Inc. v. Adolph Coors Co.,* 701 F.2d 542 (5th Cir. 1983) (*en banc*); *United States v. Michael Schiavone & Sons, Inc.,* 450 F.2d 875 (1st Cir. 1971); *Mascuilli v. United States,* 383 F. Supp. 50 (E.D. Pa. 1974), *aff'd without opinion,* 519 F.2d 1398 (3d Cir. 1975).

743 F.2d at 1299-1300. In the present case, like *Handguards,* the increased amount of the judgment on retrial was not the result of any accounting for the time value of money between the dates of the two judgments. In both the 1979 trial and the 1981 damage trial, Plaintiffs' theory of damages remained the same: the damages were valued as of May 1977. *Compare* 559 F. Supp. at 930-38 (1981 damage trial), *with* 518 F. Supp. at 120-21 (1979 damage trial).

Moreover, the Ninth Circuit in allowing postjudgment interest to commence as of the date of the original judgment followed the majority rule which allows a prevailing plaintiff "postjudgment interest from the date of *the original judgment* in his favor." *Chattem, Inc. v. Bailey,* 108 S. Ct. 2831, 2832 (White, J., dissenting from denial of certiorari) (emphasis added). Thus, notwithstanding subsequent recalculation of damages as in the present case, most circuits allow interest to date back to the original judgment calculating the amount of damages.[9]

Although the Court of Appeals properly held that interest commenced running earlier than issuance of the Court of Appeals' mandate on July 1, 1986, it erred in failing to award interest back to August 22, 1979 (when the original judgment was entered in favor of Plaintiffs

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9 As discussed in Plaintiffs' Brief in Opposition to Kaiser's Petition for Certiorari, the Courts of Appeals appear to be unanimous in endorsing the equity of the statute in interpreting 28 U.S.C. § 1961 to allow commencement of the running of interest on the judgment from the date of the original judgment in the District Court, rather than the entry of judgment following remand after issuance of the appellate court mandate. See Brief in Opposition to Kaiser's Petition for Certiorari, No. 88-1595, at 27-28.

in the district court). Where there are multiple judgments recalculating damages, all based on a single undisturbed liability finding and judgment, postjudgment interest should run from the date of the original calculation of damages—as long as any subsequent calculations of damages do not account for the time value of money after the date of the original judgment. This is the general rule stated by the Ninth Circuit in *Handguards,* and this rule best carries out the policy behind the federal interest statute to preserve the value of the judgment against diminution due to loss of the time value of money.

At least two decisions of this Court also have affirmed the allowance of interest on the judgment from the date of original judgments, notwithstanding subsequent reductions in the amount of such judgments. *De La Rama v. De La Rama,* 241 U.S. 154, 159-60 (1916); *Kneeland v. American Loan and Trust Co.,* 138 U.S. 509 (1891).

As the District Court in *Handguards* noted, there is no reason why this well accepted rule should not be extended to cases recalculating the damage which result in an increase in the damage amount. *Handguards, Inc. v. Ethicon, Inc.,* 552 F. Supp. 820, 821-22 (N.D. Cal. 1982), *aff'd,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985); *see also Twin City Sportservice, Inc. v. Charles O. Finley & Co.,* 676 F.2d 1291, 1310 (9th Cir.), *cert. denied,* 459 U.S. 1009 (1982); *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 616 F.2d 394, 406 (9th Cir.), *cert. denied,* 449 U.S. 831 (1980).

Third Circuit Precedent And Error

The Third Circuit's denial of interest back to August 22, 1979 in the present case is inexplicably inconsistent with governing precedent even within the Third Circuit:

¶ In *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 927 (3d Cir. 1985), the Third Circuit remanded a fee award for recalculation, but held that interest on that award under 28 U.S.C. § 1961 should be calculated on the amount of the award ultimately established on remand, with interest beginning to run *from the date of the original award* below, not from the date of the recalculation. *Id.* at 927.

¶ Similarly, in the present case, interest should properly be awarded from the original judgment in favor of Plaintiffs on August 22, 1979, not on the date of recalculation of damages on December 2, 1981.

¶ *See also Mascuilli v. United States*, 383 F. Supp. 50 (E.D. Pa. 1974) (postjudgment interest runs from June 25, 1968 judgment on liability and damages, notwithstanding subsequent vacation of damage portion of the judgment and recalculation of damages), *aff'd without opinion*, 519 F.2d 1398 (3d Cir. 1975).

The Court of Appeals' stated reasons for distinguishing *Institutionalized Juveniles* and *Handguards* from the present case are without substance. The Court below suggested that the present case was different from *Institutionalized Juveniles* because that case involved the court's "modifying a judgment." 865 F.2d at 571 n.6, Pet. A-12 n.7. The court in *Institutionalized Juveniles*, however, did not simply "modify" the district court judgment. The judgment was "vacated in part, and the case remanded for further proceedings." 758 F.2d at 927. In the further proceedings the district court was directed to recalculate the fee award and then grant "postjudgment interest . . . on the amount of the recalculated award *from the date of its original order* awarding the fee." *Id.* (emphasis added). Similarly, in the present case, interest should run on the recalculated judgment amount from the date of the original judgment in favor of Plaintiffs.

The court below attempted to distinguish *Handguards* by describing that case as "holding that plaintiff is entitled only to postjudgment interest from the date of the first judgment to the date of the second judgment because the claim was not liquidated until the first judgment." 865 F.2d at 571 n.6, Pet. A-12 n.7.

¶ *First*, the Third Circuit was incorrect to the extent it suggested the court in *Handguards* limited the plaintiff in that case to interest over the period between the two judgments. There was no dispute that plaintiff *was entitled* to interest after the second judgment. *See Handguards*, 743 F.2d at 1298.

¶ *Second*, the Ninth Circuit in *Handguards* specifically held that the plaintiff *was entitled* to postjudgment interest over the period between the first and second judgments, just as Plaintiffs in the present case are reqesting interest between the first and second judgments in their favor. *Id.* at 1299-1300 & n.28.

(b) Decisions Of The First, Fifth, Sixth, Eighth, Tenth And Federal Circuits Are In Accord With The Ninth Circuit *Handguards* Rule

An examination of the cases in the various circuits reveals conformity of the opinions to the general rule set

forth by the Ninth Circuit in *Handguards*: Postjudgment interest should be awarded from the date of the original judgment establishing liability and calculating damages, unless there is some accounting for the time value of money after that date in a subsequent recalculation of the amount of damages. This general rule comports with the policy behind 28 U.S.C. § 1961 to preserve the value of the judgment against diminution due to loss of the time value of money. It insures justice between the parties by preserving the value of the judgment entered in favor of the innocent and wronged plaintiff, and disgorges the windfall benefit that would otherwise result in favor of the wrongdoing defendant. These principles are particularly important in the present case, which involves intentional predatory monopolization and intentional destruction of a family business by a large international corporation, and in which damages were measured in 1977 dollars.

Moreover, although other circuits have not stated the generally applicable rule as concisely and clearly as the Ninth Circuit in *Handguards*, an examination of the leading cases from other circuits reveals that the Ninth Circuit approach is the general governing standard among the various circuits in determining when interest begins to run where there are multiple recalculations of the amount of damages.[10]

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10 1st Cir.: *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971) (interest should run from the original liability judgment of June 30, 1969—even though the damages assessed on that date had been vacated and subsequently recalculated).

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The Court of Appeals' decision denying almost 2½ years interest by failing to award interest back to August 22, 1979, is at odds with the foregoing precedent and conflicts with the basic policy behind the federal interest statute and the federal antitrust laws.

(Continued from previous page)

5th Cir.: *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc) (fee award should bear postjudgment interest on the increased amount of $244,687.50 from the date of the original award of $45,000).

6th Cir.: *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir. 1988) (interest should run from October 27, 1980 judgment, despite an intervening appeal which had vacated the compensatory damage assessment and remanded for retrial of those damages), *cert. denied*, 108 S. Ct. 2831 (1988).

8th Cir.: *Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th Cir. 1987) (postjudgment interest should run from date of original judgment but on principal amount ultimately determined later after resolution of amount of set off).

Fed. Cir.: *Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988) ("Interest on an attorney fee award thus runs from the date of the judgment establishing the right to the award, not the date of the judgment establishing its quantum.").

10th Cir.: *Compare Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987) (postjudgment interest should commence as of the original judgment in 1974, despite reversal and recalculation of damages, where the difference between the first and second judgment did not go to any basic issues of liability, but merely was a matter of recalculating damages), *cert. dismissed*, 109 U.S. 28 (1988), *with FDIC v. Rocket Oil Co.*, 865 F.2d 1158, 1161-62 (10th Cir. 1989) (where original judgment was reversed on basic liability issues—there had never been any verdict or judgment in favor of plaintiff until the reversal on appeal—postjudgment interest should not run from the date of a District Court judgment in favor of the defendant that was reversed on appeal).

IV. CONCLUSION

For the reasons stated above, and in Plaintiffs' Brief in Opposition to Kaiser's Petition for Certiorari, Plaintiffs respectfully request that Kaiser's petition be denied. If Kaiser's petition is granted, respectfully, the Court should also grant the instant cross-petition to consider all of the interrelated interest issues decided by the Third Circuit.

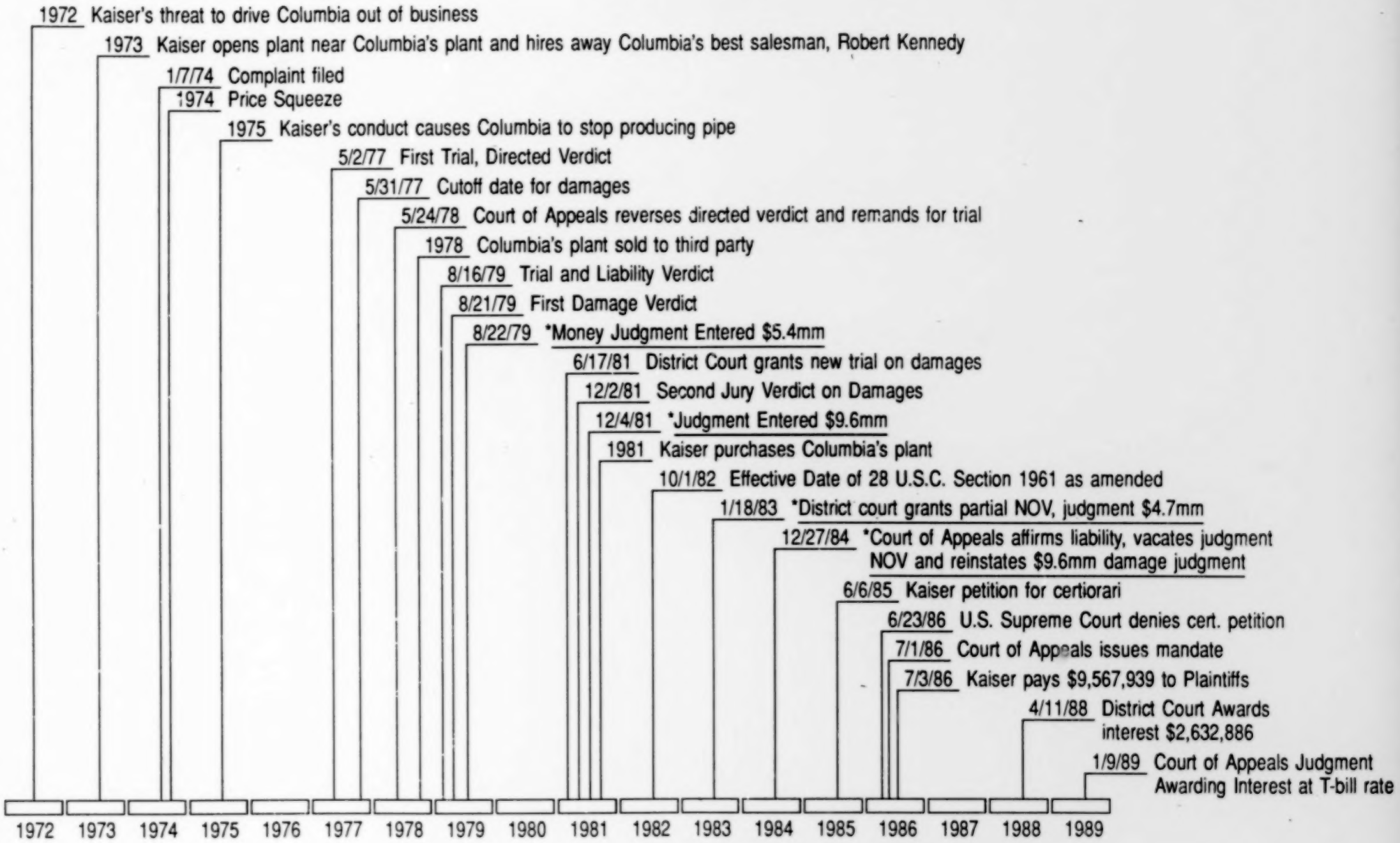
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APPENDIX

BONJORNO TIME LINE



*denotes the various "judgments" entered in this case

Supreme Court, U.S.
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(2)

No. 88-1771

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOSEPH A. BONJORNO, LORRAINE KERR, and BARBARA K. CLISBY,
Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Cross-Respondents.

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 88-1771

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOSEPH A. BONJORNO, LORRAINE KERR, and BARBARA K. CLISBY,
Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Cross-Respondents.

Cross-petitioners, Joseph A. Bonjorno, Lorraine Kerr, and Barbara K. Clisby, have raised no questions worthy of this Court's attention. They raise no conflict among the circuits. They raise no unsettled legal issues. On the contrary, the determination of the Court of Appeals concerning the issues raised by cross-petitioners was correct and conformed to the consistent positions on these issues taken by other courts. Cross-petitioners point to no authority in their favor. This Court should deny the Conditional Cross-Petition regardless of the disposition of Petitioner/Cross-Respondent Kaiser's Petition for a Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

Kaiser hereby incorporates by reference the Statement of the Case contained in its Petition For a Writ of Certiorari, No. 88-1595.

REASONS FOR DENYING THE CROSS-PETITION

A. The Court of Appeals Correctly Determined That It Had No Power To Deviate From The Postjudgment Interest Rate Mandated By The Federal Postjudgment Interest Statute.

Cross-petitioners ask this Court to declare that the Court of Appeals erred in not awarding postjudgment interest at *prime rate,* notwithstanding a federal statute prescribing a rate of postjudgment interest lower than prime rate. The Court of Appeals correctly[1] disposed of cross-respondents' argument. This Court need not review the routine decision of the Court of Appeals to adhere to the terms of a governing federal statute.[2]

1. The Court Of Appeals Was Bound By The Terms Of § 1961.

Cross-petitioners' argument that the Court of Appeals should have exercised its so-called "inherent equitable power" to award interest at *prime rate* in total disregard of the statutory mandate of Congress has no merit. This Court has consistently "emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines v. Transport Workers Union,* 451 U.S. 77, 95 (1981). Congress prescribed the appropriate rate of postjudgment interest in the prior and amended versions of § 1961 and the Court of Appeals properly held itself bound to apply the law enacted by Congress.

1. The decision of the Court of Appeals was "correct" insofar as it rejected cross-petitioners' argument that it should award prime rates of postjudgment interest. As Kaiser demonstrated in its Petition for Certiorari, No. 88-1595, the Court of Appeals erred in retroactively applying amended § 1961 to a judgment entered prior to its effective date.

2. The text of the Opinion of the Court of Appeals is set forth at length in the Appendix attached to Kaiser's Petition at A-3 through A-28.

This Court in the past has rejected attempts such as this by litigants to obtain interest beyond the amount allowed by statute. In *Pierce v. United States,* 255 U.S. 398, 406 (1921), this Court stated:

> At common law judgments do not bear interest; *interest rests solely upon statutory provision. The only applicable statute of the United States is section 966 of the Revised Statutes (Comp. St. § 1605)* (Citations omitted).[3]

Cf. West Wisconsin Railway Co. v. Foley, 94 U.S. 100 (1877) (Supreme Court rule which provides that damages for delay "shall" be computed at a certain rate sets *mandatory upper limit*).

There is no reason to grant the Cross-Petition to review the Court of Appeals' routine application of the well-established principle that it had no authority to deviate from the terms of a valid federal statute.

2. The Cases Cited By Cross-Petitioners Do Not Support Deviation From The Postjudgment Interest Rate Prescribed By Congress.

The cases relied upon by cross-petitioners to support an award of prime rate postjudgment interest are inapposite.

Three of the cases, *National Bank of the Commonwealth v. Mechanics' Nat'l. Bank,* 94 U.S. 437 (1877), *Perkins v. Fourniquet,* 55 U.S. 328 (1853), and *Brock v. Richardson,* 812 F.2d 121 (3d Cir. 1987), involved claims or equitable decrees to which the federal postjudgment interest statute *did not apply* because they were not "judgments".[4] These cases provide no support

3. Section 966 was the predecessor statute to § 1961.

4. Significantly, in *Mechanics' Nat'l. Bank,* even though the predecessor postjudgment interest statute to § 1961 did not apply, this Court borrowed the specific rate contained in the statute. In *Perkins,* where the postjudgment interest statute did not apply, the Court used a *lower* rate.

for calculation of interest at a higher rate than prescribed in the applicable statute in a situation where either the amended or prior version of the postjudgment interest statute *does* apply.

This Court's decision in *Mitchell v. Harmony,* 54 U.S. 115, 147-49 (1852), also provides no support for cross-petitioners' argument that the Court of Appeals may disregard § 1961. In that case, the Court resolved a conflict between its own Supreme Court Rule 18, a rule promulgated pursuant to Sec. 23 of the Judiciary Act of 1789, and the predecessor postjudgment interest statute to § 1961. The Court decided to apply the *lower* interest rate prescribed by its own rule. The Court did not address any nonstatutory authority to award interest. In addition, it applied a statutorily-authorized *Supreme Court* rule which would not apply to the calculation of interest by any other court. The case provides no support for an argument that the Court of Appeals had authority to deviate from the terms of the then-applicable postjudgment interest statute.

Finally, cross-petitioners inexplicably rely on *Boyce's Executors v. Grundy,* 34 U.S. 275 (1835). That case was decided prior to the enactment of any federal postjudgment interest statute. Moreover, the Court in that case reversed the circuit court's award of interest, finding that *no postjudgment interest was allowable. Boyce's Executors,* like the other cases cross-petitioners rely on, provides no support for an award of prime rate interest here.

3. Section 1961 Applies To This Case And § 1912 Does Not Apply.

Cross-petitioners make the unprecedented argument that 28 U.S.C. § 1961 does not govern the calculation of postjudgment interest by the Court of Appeals.[5]

5. Cross-petitioners raise this argument for the first time before this Court and it should be rejected for this reason alone. *See,*

Instead, they argue that § 1961 only applies to calculations of postjudgment interest *made by the district court.* They posit that 28 U.S.C. § 1912 provides the applicable law for postjudgment interest calculations by the Court of Appeals.

This argument is wholly specious.

First, § 1961 applies to the calculation of postjudgment interest on *all money judgments* "recovered in a district court." Its application does not depend on which court performs the interest calculation.

In addition, § 1912 clearly does not apply here. That section provides that "[w]here a judgment is *affirmed* by the Supreme Court or a Court of Appeals, the court in its discretion may adjudge to *the prevailing party* just damages for his delay, and single or double costs." (Emphasis added). This section only applies where a losing party files a frivolous appeal for the purposes of delay and where the Court of Appeals *affirms* a judgment. *See, e.g., Deming v. Carlisle Packing Co.,* 226 U.S. 102 (1912) (construing predecessor statute); *Grimes v. Commissioner,* 806 F.2d 1451, 1454 (9th Cir. 1986); *In re American Pres. Lines, Ltd.,* 804 F.2d 1307, 1310 (D.C. Cir. 1986); *Emaldio v. Pocahontas Steamship Co.,* 355 F.2d 55, 57 (4th Cir. 1966).

There have been no affirmances by the Court of Appeals here either in the appeals on the merits, or with respect to postjudgment interest. In the merits appeals, the Court of Appeals reversed. In its postjudgment interest decision, it reversed in part and affirmed in part. In addition, cross-petitioners have not argued that Kaiser's appeals or cross-appeals were frivolous or taken solely for delay. According to its explicit terms, therefore, § 1912 does not apply here.

The decision by the Court of Appeals to apply the rate prescribed in § 1961 to calculate postjudgment

e.g., E.E.O.C. v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986).

interest, rather than to resort to some speculative and variable "equitable" measure of postjudgment interest derived somehow from § 1912, follows an unbroken line of authority. Cross-petitioners cite not one case in support of their argument that § 1912 applies. There is no confusion among the courts which might call for review by this Court. The Conditional Cross-Petition should be denied.

4. **The Approach Suggested By Cross-Petitioners Would Encourage Litigation Regarding Postjudgment Interest And Would Frustrate Congress' Intent To Establish Uniformity In Postjudgment Interest Rates.**

The Court of Appeals properly rejected cross-petitioners' argument that in "exceptional" cases it has the "equitable discretion" to vary the postjudgment interest rate in order adequately to preserve the value of the judgment. Any other result would create confusion and encourage appeals on the issue of postjudgment interest. The postjudgment interest calculation would present to each litigant the opportunity to argue that the case was an "exceptional" one which merited deviation from the general rule.[6] In addition, once it found the case exceptional, the court in each "exceptional" case would be required to determine exactly what rate of interest would adequately preserve the value of the judgment to that particular plaintiff.

The case-by-case approach suggested by cross-petitioners conflicts squarely with Congress' intent to

6. Cross-petitioners do not precisely articulate the reason why a case would be deemed "exceptional" so as to merit deviation from the terms of § 1961. They imply that antitrust cases are in some sense different from "run-of-the-mill" cases. Cross-Petition at 13, 15. However, this argument runs contrary to the explicit language of both prior and amended § 1961, which states without exception that the rate applies to "any money judgment in a civil case recovered in a district court."

establish uniformity in this area. *See, e.g.,* S. Rep. No. 275, 97th Cong., 1st Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21; Letter from Alice M. Rivlin, Director Congressional Budget Office to Sen. Thurmond, *reprinted in* 1982 U.S. Code Cong. & Admin. News 42. To accurately carry out Congress' intent, this Court should adhere to its holding in *Pierce v. United States,* 255 U.S. 398, 406 (1921), that "interest rests solely upon statutory provision." The applicable statute is § 1961, in its prior or amended form, and there is simply no reason to grant the Cross-Petition.[7]

5. **Kaiser's Appeals Were Meritorious And Not Taken For Purposes Of Delay.**

Cross-petitioners contend that the "low" statutory postjudgment interest rates encourage litigants frivolously to "go out of their way to relitigate issues on post-trial motions and on appeals and petitions for certiorari, simply to receive the benefit of the time value of money." Cross-Petition at 21. While they imply that such frivolous litigation occurred in this case, they stop short of making such a contention. Thus, this argument does not apply here and should not be considered.

7. Cross-petitioners attempt to glean some support for their argument from the fact that Congress *rejected* a version of amended § 1961 which set the postjudgment interest rate at prime rate. Cross-Petition at 22. *See* S. Rep. No. 275, 97th Cong., 1st Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 40. Clearly, however, the fact that Congress *rejected* prime rate postjudgment interest does not support an argument that Congress *intended to allow* prime rate postjudgment interest. On the contrary, Congress' intent clearly was *not* to allow prime rate postjudgment for any litigants. *See National R.R. Passenger Corp. v. National Ass'n. R.R. Pass.,* 414 U.S. 453, 458 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode it includes the negative of any other mode' ") (quoting *Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929)).

Even if cross-petitioners had squarely contended that Kaiser had filed frivolous motions, appeals and petitions, the contention would be easily disposed of. The post-trial motions, appeals and petitions for certiorari in this case were not frivolous, were not "relitigated" and were not pursued for purposes of receiving the benefit of the time value of money.

Kaiser repeatedly *prevailed* on its post-trial motions. Moreover, it was *cross-petitioners,* not Kaiser, who initiated *all three of the appeals* in this case.[8] Even with respect to the issues upon which cross-petitioners prevailed, the courts were divided and the victories were not always unanimous. For instance, Circuit Judges Adams and Becker dissented from the denial of rehearing in one of the appeals. In the court below here, Judge Stapleton dissented and three circuit judges voted for rehearing. Justice White dissented from the denial of Kaiser's Petition for a Writ of Certiorari in 1986.

Significantly, the district court below found that Kaiser's appeals and petitions for certiorari "were not frivolous and for the purpose of delay to benefit from the higher commercial market rates of interest during the period the litigation was pending." A-46 through A-47. Cross-petitioners' veiled implication that Kaiser should pay prime rate postjudgment interest as a deterrent to frivolous litigation is directly at odds with the facts of this case.

B. This Court Should Not Disturb The Third Circuit's Refusal To Measure Interest From A Damage Judgment Vacated Due To Plaintiffs' Failure To Prove Damages.

Kaiser agrees with cross-petitioners that this Court should grant certiorari to address whether the Court of Appeals chose the proper date on which to begin the accrual of postjudgment interest. However, this Court

8. In two of the three appeals, Kaiser filed cross-appeals.

need not review the Court of Appeals' decision to reject August 22, 1979 as that date.[9] The August 22, 1979 judgment was vacated when the district court granted Kaiser's motion for a new trial. The court found that plaintiffs offered insufficient evidence to support the jury verdict at the first trial on damages and that the August 22, 1979 damage verdict was the product of confusion and speculation.

Cross-petitioners have not come forward with even one case to support their position that postjudgment interest may run from the date of a damage judgment which is vacated because of the plaintiffs' failure of proof, and which is never reinstated, increased, reduced or even appealed.

1. The Ninth Circuit's Decision In Handgards Does Not Support Calculation Of Interest From August 22, 1979.

Cross-petitioners place primary reliance on *Handgards, Inc. v. Ethicon, Inc.,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985). That case, however, is clearly distinguishable. In *Handgards,* the plaintiff prevailed on liability *and* damages at a first trial. The Court of Appeals reversed, finding a defect in the liability standard utilized by the court, but finding nothing incorrect with respect to the calculation of damages. On remand, the court allowed the jury to reconsider both liability and damages, notwithstanding that the damage verdict was undisturbed by the Court of Appeals. The jury again returned a verdict of liability and damages that exceeded somewhat the damages found in the first trial. The Court of Appeals affirmed the district

9. Cross-petitioners appear to have abandoned their prior position that postjudgment interest should accrue from the date of the unliquidated liability verdict, prior to the date of entry of *any* judgment. The Court of Appeals correctly rejected this argument and cross-petitioners have absolutely no authority for such an argument before this Court.

court's decision to measure postjudgment interest on the second damage judgment from the date of the first judgment.

The court's decision was grounded on *Mt. Hood Stages, Inc. v. The Greyhound Corp.*, 616 F.2d 394, 406 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), and *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1310 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982). In those cases, appeals were taken on the issue of the statute of limitations and the damages initially determined remained undisturbed. When liability was reaffirmed, the identical damage judgments were restored. In *Handgards*, the court followed this reasoning and found that the first damage judgment and the second damage judgment were essentially identical: both were valid and both included the same elements. Only the standard with respect to liability had been addressed and altered as a result of the appeal. *See Handgards*, 743 F.2d at 1299 ("it can be said that the second judgment 'remains the same – in the same amount, for the same damages incurred during the same period' ") (quoting *Twin City*, 676 F.2d at 1311).

The *Mt. Hood, Twin City* and *Handgards* decisions do not apply in a situation such as this, where the first damage verdict is vacated because it is *defective*. Here, the second judgment can in no way be said to be the "same". Clearly, the measurement of interest may not begin until plaintiff has adequately proven the existence of its damages.

2. **The Other Cases Relied Upon By Cross-Petitioners Are Inapposite.**

Not one of the other cases relied upon by cross-petitioners stands for the proposition that postjudgment interest may begin to accrue prior to the date when the plaintiff adequately proves entitlement to damages and a judgment for damages has been entered. *See United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971) (Court of Appeals reduced

amount of damages by eliminating one element); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (recalculation of attorneys fee award); *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988) (damage award recalculated due to erroneous jury instruction); *Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th Cir. 1987) (damage amount modified on appeal); *Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988) (interest awarded from date plaintiff established right to award of some attorneys fees); *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987) (recalculation of damage figure by Court of Appeals).

This Court need not review the decision of the Court of Appeals which is consistent with all the case law on the subject.[10]

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10. Cross-petitioners argue that the Court of Appeals' decision is inconsistent with prior opinions of the Third Circuit. Even if this were true – which it is not – this does not provide grounds for granting the Cross-Petition. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Moreover, cross-petitioners did not petition for rehearing before the Court of Appeals, which would be the proper device to address an alleged conflict within the circuit.

CONCLUSION

The Conditional Cross-Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,
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October Term, 1988

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), AND BARBARA K. CLISBY,

Cross-Petitioners

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-PETITIONERS' REPLY BRIEF

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CROSS-PETITIONERS' POINTS IN REPLY

Cross-Respondents' Brief in Opposition to Cross-Petitioners' Conditional Cross-Petition is an astounding attempt to deny reality:

1. *Kaiser ignores the 15-year history of this litigation* set forth at length in the Bonjorno Time Line in the Appendix to the Cross-Petition. Plaintiffs suffered injury at Kaiser's hands beginning over 15 years ago. Plaintiffs' damages were measured as of May 30, 1977, over 12 years ago. Plaintiffs secured a money judgment in federal District Court on August 22, 1979, over nine years ago. Kaiser has reaped a benefit of more than $17 million by delaying any payment on its liability from August 1979 until July 1986, and by refusing to pay Plaintiffs any interest whatsoever.

2. *Kaiser ignores Federal Rule of Appellate Procedure 37* which governs the award of interest on judgments of the Court of Appeals and grants the Court discretion to award adequate interest to preserve the value of the judgment against diminution due to loss of the time value of money. Astoundingly, Kaiser's Brief does not even discuss, let alone *cite* Federal Rule of Appellate Procedure 37 although that rule is at the heart of Cross-Petitioners' arguments. Kaiser also entirely ignores the holding of the Tenth Circuit in *Northern Natural Gas Co. v. Hegler,* 818 F.2d 730, 738 (10th Cir. 1987) that even district courts have "discretion to keep the rates in accordance with the real world."

3. *Kaiser ignores all principles of equity* in contending in its Brief that Courts do not have authority "to vary the postjudgment interest rate in order *adequately to preserve the value of the judgment,*" (Cross-Respondents' Brief at 6

(emphasis added)). At the same time, it contends in its own Petition for Certiorari that "manifest injustice" warrants application of a law repealed by Congress seven years ago, in a manner that would even further dilute the value of the judgment.

Kaiser also disingenuously contends that the goal of "uniformity" supports its position, while arguing for reinstatement of the very lack of uniformity Congress sought to avoid by repealing the law providing for interest on federal judgments at various state law rates.

4. *Kaiser attempts to ignore the different bases of authority for awards of interest in federal courts* by suggesting that interest under one provision or another is either higher or lower than the interest provided under 28 U.S.C. § 1961. Cross-Respondents' Brief at 4. Kaiser thus acknowledges that there are a number of different bases for interest awards in federal courts, but fails to meet Plaintiffs' argument that Federal Rule of Appellate Procedure 37 provides *discretion* to the Court of Appeals in setting the rate of interest adequately to protect the value of the judgment against diminuation due to loss of the time value of money.

Both of the cases upon which Kaiser principally relies support Plaintiffs' position. In *West Wisconsin Railway v. Foley*, 94 U.S. 100 (1877), this Court reaffirmed its prior holdings, cited in Plaintiffs' Cross-Petition at 17, that *this Court's* Rules governed interest on this Court's judgments, not the predecessor to 28 U.S.C. § 1961 which only governed interest on *district court* judgments. Similarly, in the present case Fed. R. App. P. 37 governs interest on the Court of Appeals' judgment, not 28 U.S.C. § 1961, which

is expressly limited by its terms to district court judgments.

Moreover, this Court in *Foley* held that 10% provided the upper limit for interest under this Court's Rule in effect at the time, but the award should be adjusted to accurately "compensate to some extent for the loss which results from delay." 94 U.S. at 103. In the present case, Fed. R. App. P. 37 *does not provide an upper limit* and therefore an award at market rates is appropriate as the measure of the diminution of the value of the judgment.

Moreover, *Pierce v. United States*, 255 U.S. 398 (1921), cited in Kaiser's Brief at 3, also supports Plaintiffs. In *Pierce*, as in the cases cited in Plaintiffs' Cross-Petition at 17, this Court noted the limited scope of the predecessor to 28 U.S.C. § 1961. That statute applies by its terms to civil judgments at law in district court, but there are clearly other independent bases for interest awards in the federal courts, including Fed. R. App. P. 37, which is at issue in the present case.

5. *Kaiser ignores the effect of jury verdicts and mischaracterizes the record in suggesting that it "prevailed on its post-trial motions."* In reality, all of Kaiser's post-trial motions as to liability were denied. Kaiser's post-trial motions seeking to retry or overrule the jury's findings on damages were ultimately *unsuccessful*, as the retrial limited to damages resulted in an *increase* in the damages awarded by the second jury, and the Court of Appeals ultimately reinstated that jury's verdict as to damages, notwithstanding Kaiser's securing an incorrect ruling from the District Court attempting to reduce those damages.

6. *Kaiser ignores the fact that a money judgment was entered against it in District Court on August 22, 1979,* and although damages were subsequently recalculated, the liability finding and judgment were never disturbed. Thus, contrary to Kaiser's misleading discussion of post-judgment interest cases (Cross-Respondents' Brief at 9-11), interest from the original judgment is even more compelling in the present case than in the Ninth Circuit cases such as *Handguards, Inc. v. Ethicon,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985), in which the first judgment was reversed on grounds of, *inter alia,* "insufficient evidence to support a jury charge on one of plaintiff's two theories of liability" and in which "[a]fter a new trial, a jury awarded damages in an amount larger than the first judgment." *Handguards, Inc. v. Ethicon, Inc.,* 552 F. Supp. 820, 822 (N.D. Cal. 1982), *aff'd,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985). Kaiser has stated no basis whatsoever for distinguishing the present case from the other cases cited by Cross-Petitioners which all support interest dated back to the original judgment in favor of the party seeking interest, not the date upon which damages were recalculated. *See* Cross-Petition at 22-29.

7. *Kaiser ignores Plaintiffs' argument below for market rates.* Contrary to Kaiser's suggestion that Cross-Petitioners failed to contend below that Federal Rule of Appellate Procedure 37 governs the rate of interest in the present case, Plaintiffs' brief below contained express arguments that:

> "TO VINDICATE AND IMPLEMENT THE BASIC POLICIES DISCUSSED ABOVE, THE COURT, PURSUANT TO ITS EQUITABLE POWERS UNDER FED. R. APP. P. 37, SHOULD AWARD INTEREST AT FULL MARKET RATES"

That section of Plaintiffs' appellate brief is reproduced in an appendix to this brief at A-1 to A-7.

8. *Kaiser ignores Plaintiffs' Conditional Petition for Rehearing.* Contrary to Kaiser's suggestion that Cross-Petitioners did not petition for rehearing before the Court of Appeals, Plaintiffs filed a Conditional Petition for Rehearing, similar to the Conditional Cross-Petition they have filed before this Court. The section on the Summary of Plaintiff's Position set forth in their Conditional Petition for Rehearing filed in the Third Circuit is reproduced in the Appendix to this Brief at A-8 to A-10.

9. *This Court should deny certiorari on Kaiser's Petition in No. 88-1595.* Kaiser attempts to misstate Cross-Petitioners' position by suggesting that it agrees with a position Cross-Petitioners have never taken. Contrary to Kaiser's statement on page 8 of its Brief, Cross-Petitioners' vigorously oppose the grant of certiorari. Cross-Petitioners have asserted only a *Conditional* Cross-Petition, requesting the Court to grant certiorari on the issues raised by Cross-Petitioners *only* if the Court grants Kaiser's Petition for Certiorari.

Kaiser's Brief in Opposition to Plaintiffs' Conditional Cross-Petition, like the rest of Kaiser's pleadings and briefs in this 15-year litigation, simply fails to meet the substance and justice of Plaintiffs' contentions and attempts to deny the effects of the wrong perpetrated by Kaiser upon Plaintiffs. Kaiser has taken away not only Plaintiffs' business, but 15 years of their lives in pursuing justice in the Courts. Kaiser argues for inequitable results allowing it to keep the $17 million windfall it has obtained by delaying payment on Plaintiffs' judgment,

and fails to establish any basis for such an inequitable result by failing even to address the basic legal arguments raised by Plaintiffs.

CONCLUSION

For all the reasons stated above, as well as the reasons stated in Plaintiffs' Conditional Cross-Petition for Certiorari and Plaintiffs' Brief in Opposition to Kaiser's Petition for Writ of Certiorari, Plaintiffs respectfully request that Kaiser's Petition be denied. If Kaiser's Petition is granted, respectfully, the Court should also grant the Plaintiffs' Cross-Petition to consider all of the interrelated interest issues decided by the Third Circuit.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, Appellants–Plaintiffs–Cross-Appellees	)	
vs.	)	NOS. 88-1318 and 88-1396
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Appellees–Defendants–Cross-Appellants	)	

APPEAL FROM ORDER OF
THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA
(C.A. 74-122)

BRIEF OF APPELLANTS–PLAINTIFFS–CROSS-APPELLEES JOSEPH A. BONJORNO, GEORGE M. KERR, JR. AND BARBARA K. CLISBY IN SUPPORT OF THEIR CLAIM FOR INTEREST ON THE JUDGMENT

* * *

B. TO VINDICATE AND IMPLEMENT THE BASIC POLICIES DISCUSSED ABOVE, THE COURT, PURSUANT TO ITS EQUITABLE POWERS UNDER FED. R. APP. P. 37, SHOULD AWARD INTEREST AT FULL MARKET RATES

In assessing the appropriate amount of interest, it is important to stress again that if Kaiser were to prevail in its argument that it owes only $1,223 interest, it would have been able to pay off the entire damage judgment of $9.6 million out of its $17 million gain from the use of Plaintiffs' money and retain a profit from delay of $7.4 million. As discussed below, this Court possesses inherent equitable powers, as reflected in Fed. R. App. P. 37, to award full market rates – and is not limited to the T-Bill rates set by amended 28 U.S.C. § 1961.

1. This Court Has Inherent Equitable Powers Under Fed. R. App. P. 37 To Award Interest At Full Market Rates

Numerous cases, commentary and decisions in this circuit, establish this Court's inherent equitable and restitutionary powers under Federal Rule of Appellate Procedure 37 to award interest.[43] In *Brock v. Richardson*, 812

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[43] *See generally Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948) (discussing power of appellate court over appropriate interest award); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561-64 (3d Cir. 1985) (in banc) (discussing inherent power of court); *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987) (equitable power to award postjudgment interest).

The Judiciary Act of 1789 empowered the Supreme Court and circuit courts to award "just damages for . . . delay" upon affirmance of a judgment or decree. Judiciary Act of

(Continued on following page)

F.2d 121 (3d Cir. 1987) this Court held that an equitable award of interest was appropriate to preserve the value of an equitable remedy, regardless whether 28 U.S.C. § 1961 mandated interest on the award.[44]

Moreover, when the Court exercises its equitable power to award interest, it should be awarded at market rates to carry out the purpose of interest to preserve the

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(Continued from previous page)

1789, ch. 20, Sec. 23, 1 Stat. 73, 85. This Statute, which is currently codified at 28 U.S.C. § 1912, is the basis for Supreme Court rules, which have been in effect since 1803 allowing interest on judgments while pending on a writ of error before the Supreme Court. *Perkins v. Fourniquet*, 55 U.S. (14 How.) 328, 330-34 (1852); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 147-49 (1851); *Boyce's Executioners v. Grundy*, 34 U.S. (9 Pet.) 275, 289 (1835). *See* U.S. Supreme Court Rule 49.

Similarly, 28 U.S.C. § 1912 presumably forms the basis for at least the first sentence of Fed. R. App. P. 37, which mandates interest on affirmance of a judgment. The power for interest pursuant to the second sentence of Fed. R. App. P. 37 presumably stems from a combination of: (1) 28 U.S.C. § 1912; (2) 28 U.S.C. § 1961; (3) the *inherent power* of the Court; and (4) the Rules Enabling Act, 28 U.S.C. §§ 2701-2704.

[44] Exercise of this power is consistent with the authority of the courts to use the "equity of the statute" in interpeting 28 U.S.C. § 1961. On the equity of the interest statute, see *National Bank v. Mechanics National Bank*, 94 U.S. 437, 439 (1877) *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 755-57 (9th Cir. 1983).

value of the award.[45] Market rates are appropriately granted pursuant to the Court's equitable power to award postjudgment interest, as well as its equitable power to award prejudgment interest.[46]

2. Under The Special Circumstances Of This Case, Market Rates Should Be Awarded

Although there is no bright line precedent requiring awarding of full market rates, rather than the fixed T-Bill rate provided for under 28 U.S.C. § 1961, as amended, the case for market rates in this case of first impression is compelling and we urge its adoption as the just and equitable result.[47]

Kaiser has been unjustly enriched by the delay inherent in litigation. Kaiser should now pay, out of the

---

45 For cases awarding prejudgment interest at market rates as a matter of restitution, see *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981); *Lexington Insurance Co. v. Abington Co.*, 621 F. Supp. 18 (E.D. Pa. 1985); *Sack v. Feinman*, 489 Pa. 152, 413 A.2d 1059 (1980); *Murray Hill Estates, Inc. v. Bastin*, 442 Pa. 405, 276 A.2d 542, 545 (1971); *Rizzo v. Haines*, 357 Pa. Super. 57, 515 A.2d 321 (Pa. Super. 1986).

46 *Brock v. Richardson*, 812 F.2d 121, 126, 127 (3d Cir. 1987); *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 738 (10th Cir. 1987). *But see Ball v. Rolling Hill Hospital*, 359 Pa. Super. 286, 302, 518 A.2d 595 (1984); *Daset Mining Corp. v. Industrial Fuels Corp.*, 326 Pa. Super. 14, 473 A.2d 584 (1984).

47 The law always allows for change to fit the justice of the case lest rules "simply persis[t] from blind imitation of the past." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

benefits it has received by holding Plaintiffs' money,[48] sufficient interest to preserve at market rates the damage award back to the liability verdict date.

For full relief, Plaintiffs should receive an award of interest on the following basis:

> *Time Period:* From the date liability was determined (August 16, 1979)[49] until final payment of all interest and principal.
>
> *Rate:* Full market rates: monthly average prime rates, compounded monthly.[50]
>
> *Principal Amount:* The $9,567,939 damage judgment as found by the jury based on the liability verdict of August 16, 1979.

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48 The purpose of restitution is to "deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . ." D. Dobbs, *Handbook of the Law of Remedies* § 4.1, at 224 (1973).

49 As discussed below in section VI., D., 3., postjudgment interest should be awarded from August 16, 1979. Moreover, full compensation for delay would require additional interest on single damages from May 31, 1977. Plaintiffs' damages were valued as of May 31, 1977, yet Plaintiffs did not receive one cent from Kaiser until nine years later, on July 3, 1986. No compensation for delay has been received by Plaintiffs.

50 These rates are substantially less than the actual cost of money to Plaintiffs (2.5% above Philadelphia National Bank's ("PNB") daily prime rate or 3% above PNB's average monthly commercial paper rate, whichever rate was greater, compounded monthly), that they were required to pay on a $193,760.28 loan, which obligation had more than tripled to $638,627.58 through accumulation of interest through September 1986, when it was paid. *See* Affidavit of Joseph A. Bonjorno (R. 491a).

Assuming full payment was made on June 13, 1988, (i.e., the date this brief was originally due) the total award would amount to $17,080,036.78.[51]

In light of the unprecedented increase in commercial interest rates during the life of this case,[52] it is appropriate to award postjudgment interest at rates "in accordance with the real world." *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 738 (10th Cir. 1987). An award of interest at market rates is consistent with this Court's equitable power to award interest to preserve the value of the judgment. *See Brock v. Richardson*, 812 F.2d at 127; *cf. Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981) (prejudgment interest).

Moreover, an award of postjudgment interest at market rates in the present case is consistent with the law of this Circuit which generally recognizes that provisions for interest in litigation should reflect the full rate of interest in the private market.[53]

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51 *See* Affidavit of Charles J. O'Donnell, ¶5, *Addendum* at tab 4.

52 See chart of interest rates in Reitz, *Interest on Judgments* at 4. (R. 455a-1).

53 *See Phoenix Canada Oil Co., Ltd. v. Texaco, Inc.* 842 F.2d 1466, 1479-80 (3d Cir. 1988) (prejudgment interest held to fluctuate with Ecuadorian legal rate up to 23%); *Green v. USX, Corp.*, 843 F.2d 1511, 1530 & n.16 (3d Cir. 1988) (favoring presumption of award of prejudgment interest, except where award would result in "unusual inequities"); *Institutionalized Juveniles*, 758 F.2d at 922-24 (time delay adjustments to attorney fee awards should accurately reflect the time value of money); *Devex Corp. v. General Motors Corp.*,

(Continued on following page)

Thus, authority and compelling public policy reasons permit this Court, under its Rule 37 equitable powers, to award full market rates.

(Continued from previous page)

749 F.2d 1020, 1023-24 (3d Cir. 1984), *cert. denied*, 475 U.S. 819 (1985) (liberal interpretation of former § 1961 to allow plaintiffs the benefit of higher interest rate currently in effect under state law in Delaware).

IN THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, Appellants–Plaintiffs–Cross-Appellees	)	
vs.	)	NO. 88-1318 and 88-1396
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SLAES, INC., Appellees–Defendants–Cross-Appellants	)	Before: Stapleton, Scirica and Cowen, Circuit Judges

CONDITIONAL PETITION FOR REHEARING TO PRESERVE ISSUES DECIDED ADVERSELY TO PLAINTIFFS

Appellants/Plaintiffs/Cross-Appellees Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby ("Plaintiffs"), by their attorneys, submit this Conditional Petition for Rehearing to preserve (in the event that rehearing before the panel or before the active members of this Court *in banc* is granted on any petition that Defendant Kaiser may file) those issues presented, briefed, and argued to the panel, which the panel decided against the Plaintiffs:

Summary of Plaintiffs' Position

1. For reasons fully explained below, Plaintiffs/Appellants have determined that after fifteen years of litigation, enough is enough. Even though they lost on several major issues (which result in a very significant reduction in the amount of interest to which they and their counsel believe they are entitled in law and equity) they are gratified that the panel awarded them the federal T-bill annually compounded interest rather than the six percent simple interest allowed under Pennsylvania law as awarded by the Court below. Thus in the interest of terminating this case after fifteen years of expensive and exhausting litigation and getting on with their lives and businesses, they have determined not to prolong these proceedings any longer by seeking, in their own right, rehearing before the panel or this Court *in banc* on the issues they lost.

2. Plaintiffs through their counsel have so advised Kaiser through its counsel of their decision and have urged Kaiser to do the same.

3. Therefore, only in the event that the panel or the Court *in banc* were to decide to grant any request for rehearing by Kaiser, Plaintiffs wish to preserve for any rehearing that might be granted the two issues on which they lost:

a. Plaintiffs' contention that interest should run from the date of the original damage judgment on August 22, 1979;

b. Plaintiffs' contention that if interest runs from the date of the original damage judgment, this Court has the power under Federal Rule of Appellate Procedure 37 and its inherent equitable power and should award interest at full market rates, which would result in a total amount of interest in excess of $17 million.

(5) (4)

Supreme Court, U.S.
FILED
AUG 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1595, 88-1771

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners, Cross-Respondents,

v.

JOSEPH A. BONJORNO, LORRAINE KERR (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.) and BARBARA K. CLISBY,
Respondents, Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 30, 1989
CROSS-PETITION FOR CERTIORARI FILED APRIL 28, 1989
CERTIORARI GRANTED JUNE 19, 1989

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CIVIL DOCKET
UNITED STATES DISTRICT COURT
C.A. 74-122

	Date	*Proceedings*
	1974	
1	Jan 17	Complaint filed.
	Jan 17	Summons exit.
	Jan 17	JURY TRIAL DEMANDED.
2	Jan 17	Plff's requests for production of documents – First Set, filed.
3	Jan 17	Plff's motion for substituted service pursuant to FRCP 4(d)(7), filed.
[3]	Jan 18	ORDER that service of summons, complaint, and other process may be made on defts (Kaiser Ind., Kennedy Culvert, and R.A. Kennedy) by service on the Secty. of the Dept. of State of Comm. Pa., filed. AL 1-21-74 Entered & copies mailed.
4	Feb 11	Appearance of Stradley, Ronon, Stevens & Young as counsel for defts R.A. Kennedy and Kennedy Culvert & Supply Company, filed.
5	Feb 12	Stipulation that defts R.A. Kennedy and Kennedy Culvert & Supply Company's time within which to file their answer is extended to 2-20-74, with Clerk's approval, filed. CLERK
6	Feb 13	Summons returned "on 1-23-74 served Secty. of Commonwealth, Robert A. Kennedy, and Kennedy Culvert & Supply Company, all by Registered Mail; on 1-24-74 served Kaiser Industries Corporation, by Registered Mail; on 1-31-74 served Kaiser Aliminum & Chemical Corporation," filed.
7	Feb 20	Motion of Kennedy Culvert & Supply Company to dismiss complaint, presenting defenses of lack of service of process, jurisdiction, improp[illegible] venue and failure to state a

BEST AVAILABLE COPY

Date		*Proceedings*
	1974	
		claim; notice of motion; filed.
8	Feb 20	Motion of Robert A. Kennedy to dismiss complaint, presenting defenses of lack of service of process, jurisdiction, improper venue and failure to state a claim; notice of motion; filed.
9	Feb 20	Motion of deft Kaiser Industries Corporation to dismiss for lack of *in personam* jurisdiction, improper venue, and insufficiency of service of process; notice of motion; memorandum in support of motion to dismiss, filed.
10	Feb 20	Answer of deft Kaiser Aluminum & Chemical Corporation, filed. (1 of 4)
11	Feb 20	Deft Kaiser Aluminum & Chemical Corporation's First Set of interrogatories to plff, filed.
12	Feb 20	Deft Kaiser Aluminum & Chemical Corporation's First Request for the production of documents, filed.
13	Feb 21	Praecipe to issue alias summons as to Kennedy Culvert and Supply Company, filed.
	Feb 21	Alias summons, as to Kennedy Culvert & Supply Company, exit.
14	Mar 1	ORDER [dated 2-28-74] that this action be reassigned from the calendar of Judge Luongo to the calendar of Judge Green, filed. VA 3-4-74 Entered & copies mailed.
15	Mar 11	Plff's response to motions of defts Robert A. Kennedy and Kennedy Culvert & Supply Company to dismiss, filed.
16	Mar 11	Plff's first set of interrogatories to defts, Robert A. Kennedy and Kennedy Culvert & Supply Company, filed.

Date		*Proceedings*
	1974	
17	Mar 11	Plff's request to defts Robert A. Kennedy and Kennedy Culvert & Supply Company for production of documents, filed.
	Mar 13	Memorandum of Robert A. Kennedy and Kennedy Culvert & Supply Company in support of motions to dismiss under FRCP Rule 12; notice pursuant to FRCP Rule 36; affidavits of Robert A. Kennedy, in his individual capacity and as President of Kennedy Culvert & Supply Company, filed.
	Mar 20	ORDER that plff file a memorandum responding to defts' motions to dismiss for lack of jurisdiction and improper venue within 15 days after receipt of the information requested in plff's interrogatories and request for production of documents relating to these issues; decision on said defts' motions to dismiss Count V for failure to state a claim is POSTPONED pending resolution of the motions relating to personal jurisdiction and venue, filed. CG 3-21-74 Entered & copies mailed.
	Mar 21	Alias summons returned "on 3-13-74 served Secty. of Commonwealth and deft Kennedy Culvert & Supply Company, both by Registered Mail," filed.
	Apr 1	Plff's response to deft Kaiser Aluminum & Chemical Corporation's first request for production of documents, filed.
	Apr 1	Objections of plff to deft Kaiser Aluminum & Chemical Corporation's first set of interrogatories, filed.
	Apr 9	Memorandum in support of motion by deft Kaiser Industries Corporation to dismiss the complaint on the grounds of improper

Date		Proceedings
1974		
		venue, insufficiency of service of process and lack of personal jurisdiction; affidavit of James K. Parker in support thereof, filed.
	Apr 17	Plff's answers to deft Kaiser Aliminum & Chemical Corporation's first set of interrogatories, filed.
	Apr 18	Plff's first set of interrogatories to deft Kaiser Industries Company, filed.
	Apr 23	ORDER that this action is reassigned from the calendar of Judge Green to the calendar of Judge McGlynn for all further proceedings, filed. VA/Clk 4-24-74 Entered & copies mailed.
	Apr 26	Plff's notice of motion to compel defts Robert A. Kennedy and Kennedy Culvert & Supply Company to produce documents and to strike said defts' motion to dismiss, filed.
	May 6	Deft Kennedy Culvert & Supply Company's notice of abandonment of motion to dismiss for improper service of process and for improper venue, filed. [Paper #7]
	May 6	Answer of deft Kennedy Culvert & Supply Company, filed (2 of 4)
	May 6	CASE LISTED FOR TRIAL.
	May 13	Order that pursuant to the Notice of Abandonment of Motion filed on 5-6-74, the motion to dismiss for improper service of process and for improper venue, filed on behalf of Kennedy Culvert & Supply Co., on 2-20-74, is WITHDRAWN, filed. JM/Clerk 5-14-74 entered and copies mailed.
	May 14	Plff's Pre-Trial Memorandum pursuant to Local Rule 7, filed.

Date		Proceedings
1974		
	May 20	Objections of deft Kaiser Industries Corporation to plff's first set of interrogatories, filed.
33	May 21	Answers of deft Robert A. Kennedy to plff's first set of interrogatories, filed.
34	May 23	Plff's memorandum opposing motion to dismiss of deft Robert A. Kennedy, filed.
35	Jun 10	Answers of deft Kaiser Industries Corporation to plff's first set of interrogatories, filed.
36	Jun 14	Affidavit of Robert A. Kennedy in further support of his motion to dismiss, filed.
37	Jun 21	Plff's motion to compel answers by deft Kaiser Industries Corporation to interrogatories, notice of motion, and memorandum in support thereof, filed.
38	Jun 21	Plff's response to motion of deft Kaiser Aluminum & Chemical Corporation to compel further answers to first set of interrogatories to plff, filed.
39	Jun 21	Motion of deft Kaiser Aluminum & Chemical Coporation pursuant to FCRP Rule 37 to compel further answers to "first set of interrogatories to plff" and for sanctions, notice of motion, memorandum in support thereof, filed.
40	Jun 21	Stipulation and ORDER re: production of documents and confidentiality, etc., filed.
41	Jun 21	Plff's notice of deposition of Philip Buchy on 7-15-74, filed.
42	Jun 24	Memorandum of deft Kaiser Industries Corporation in opposition to plffs' motion to compel answers to interrogatories, filed.
43	Jun 24	Plffs' praecipe for the issuance of an alias summons as to deft George A. Wenzel, filed.
	Jun 24	Alias summons exit.

Date		Proceedings
1974		
4-	Jun 25	Argued sur motion of deft Robert A. Kenndey to dismiss. . . . . C.A.V.
44	Jun 28	Plff's motion to compel deft Kaiser Aluminum & Chemical Corporation to produce documents, notice of motion, memorandum in support thereof, filed.
45	Jun 28	Memorandum of deft Kaiser Aluminum & Chemical Corporation in opposition to plff's motion to compel production of documents, filed.
46	Jul 9	Plff's notice of deposition of Robert A. Kennedy, as President of dft Kennedy Culvert & Supply Company on 7-15-74, filed.
47	Jul 11	Plff's answer to deft Kaiser Aluminum & Chemical Corporation's motion to compel further answers to first set of interrogatories, filed.
48	Jul 11	Plff's supplemental answers to deft Kaiser Aluminum & Chemical Corporation's first set of interrogatories, filed.
		No Paper 49 Assigned
50	Jul 21	Reply memorandum of deft Kaiser Aluminum & Chemical Corporation in support of motion to compel further answers to interrogatories, filed.
51	Sep 10	Memorandum and ORDER, McGlynn, J. wherein it is ordered that the motion of deft Robert A. Kennedy to dismiss the complaint is GRANTED, filed. JM
		9-11-74 Entered & copies mailed.
	Sept 18	Plff's first set of interrogatories addressed to deft Kaiser Aluminum & Chemical Corporation, filed.
	Sept 24	Plff's motion for reconsideration of Order granting deft Kennedy's motion to dismiss,

Date		Proceedings
1974		
		notice of motion, with memorandum in support thereof, filed.
	Oct 2	Memorandum of deft Robert A. Kennedy in opposition to plff's motion for reconsideration, filed.
	Oct 7	ORDER that plff's motion for reconsideration is DENIED, filed. JM
		10-8-74 Entered & copies mailed.
	Oct 9	Plff's notice of appeal, filed. (74-2170)
	Oct 9	Copy of clerk's notice of appeal to U.S.C.A., filed.
	Oct 21	Bond for Costs on Appeal in the sum of $250.00 with Fidelity and Deposit Company of Maryland as surety, filed.
	Oct 21	Appellant's statement pursuant to Rule 10 of Federal Rules of Appellate Procedure, filed.
	Oct 25	Deft Kaiser Aluminum & Chemical Corporation's objections to plff's first set of interrogatories addressed to said deft, filed.
	Oct 30	Original record transmitted to U.S. Court of Appeals. [Except 43,49]
	Nov 7	Deft Kaiser Aluminum & Chemical Corporation's response to plff's requests for production of documents – first set, filed.
	Nov 25	Answers of deft Kaiser Aluminum & Chemical Corporation to plff's first interrogatories – first set, filed.
	Dec 11	Plff's motion for certification under Rule 54(b), Notice of Motion, Memorandum in support, filed.
	Dec 12	Deft., Robert A. Kennedy's answer to plff's motion for certification under Rule 54(b), memorandum contra plff's motion, filed.
	Dec 16	Plff's motion for order compelling discovery by Kaiser Aluminum & Chemical Corp ,

Date		Proceedings
1974		
		Notice of Motion & Memorandum in support, filed.
	Dec 19	Deft Kaiser Aluminum & Chemical Corporation's memorandum in opposition to plff's motion for Order compelling discovery, filed.
1975		
	Jan 7	Plff's reply memo. in support of motion to compel discovery, filed.
	Jan 8	Original record returned from U.S.C.A.
	Jan 8	Certified copy of Order from U.S.C.A. that appelle's motion to dismiss apppeal pursuant to Rule 54(b), F.R.A.P. is granted etc., filed. Aldisert
	Jan 28	Order compelling plff to answer discovery, filed. JM
		1/29/75 entered and copies mailed
	Jan 3	ORDER reassigning case from Judge Joseph L. McGlynn, Jr. to Judge Edward N. Cahn, filed. VA
		2/6/75 entered and copies mailed
		Conference memorandum, Scuderi, J., filed.
	Jan 7	Order that judgment be entered in favor of the deft, Robert Kennedy and against the plff, Columbia Metal Culvert Co., Inc., filed. JM
		2/10/75 entered and copies mailed.
	Jan 4	Plff's notice of appeal, filed. (75-1362)
	Jan 4	Copy of Clerk's notice of appeal to USCA, filed.
	Jan 31	PRETRIAL CONFERENCE, SCUDERI, J.
74	Mar 5	Deft Kaiser Aluminum & Chemical Corp's notice of deposition of Joseph A. Bonjorno, filed.
75	Mar 5	Deft Kaiser Aluminum & Chemical Corp's

Date		Proceedings
1975		
		Second Set of interrogatories to plff, filed.
76	Mar 5	Deft Kaiser Aluminum & Chemical Corp's Second request for the production of documents, filed.
--	Mar 6	Bond for costs on appeal in the sum of $250.00 with Transamerica Insurance Co. as surety, filed.
77	Mar 7	Plff's interrogatories-Second Set to deft Kaiser Aluminum & Chemical Corp., filed.
78	Mar 10	Appellant's statement pursuant to Rule 10, Federal Rules of Appellate Proceudre, filed.
--	Mar 20	PRETRIAL CONFERENCE, CAHN, J.
79	Mar 24	Conference memorandum, filed.
--	Mar 25	Original record transmitted to USCA. Except papers #43,62,63,67,70,49, and 79.
80	Apr. 4	Deposition of Robert A. Kennedy, filed.
81	Apr. 7	Answers of Kaiser Aluminum & Chemical Corp. to plff's interrogatories-Second Set, filed.
82	Apr. 7	Objections of Kaiser Aluminum & Chemical Corp. to plff's interrogatories-Second Set, filed.
83	Apr. 8	Plff's answers and objections by Columbia Metal Culvert Co., Inc. to Kaiser Aluminum interrogatories-Second Set, filed.
84	May 20	Motion of Kaiser Aluminum & Chemical Corp. for a protective order, notice and memorandum in support, filed.
85	May 20	Plff's response to motion of Kaiser Aluminum & Chemical Corp. for Protective order, filed.
86	May 30	Interrogatories of deft Kennedy Culvert to plff-First Set, filed.
--	June 9	First supplemental record transmitted to

	Date	Proceedings
	1975	
		USCA. Papers 70, 79 and 80 thru 83 inclusive.
87	June 19	Plff's supplemental answers to interrogatories, filed.
88	Jul 17	Plff's notice of deposition of Kaiser Aluminum & Chemical Corp., etc., filed.
89	Jul 17	Plff's request for production of documents, Second Set as to deft Kaiser Aluminum & Chemical Corp., filed.
90	Jul 25	Plff's motion to amend complaint, notice and memorandum of law in support, filed.
91	Jul 25	Memorandum of Kaiser Aluminum & Chemical Corp. in opposition to motion to amend plff's complaint, filed.
92	Jul 31	Stipulation and Order as follows. Upon representation by counsel for Kaiser Industries Corp., that if Kaiser Industries Corp. were to respond to plff's request for documents, First Set, Request #1 it would respond that it does not have any such documents, etc. and Kaiser Industries Corp. is dropped as a party deft and Kaiser Aluminum & Chemical Sales Inc. is added as a party deft, filed. EC
93	Aug 8	Memorandum of ldefts Robert A. Kennedy and Kennedy Culvert and Supply Co. in opposition to the filing of an amended complaint, filed.
94	Aug. 13	Deft, Kaiser Aluminum & Chemical Corp.'s notice of deposition of Phila. National Bank by Mr. Alex Gusdorff, et al, filed.
--	Aug. 14	Second supplemental record transmitted to USCA. (Not including FPaper #91 & 93
95	Aug. 18	Plff's reply brief in support of motion to amend complaint, filed
96	Sept. 4	Memorandum in response to Letter from

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	1975	
		Richard P. McElroy, Esq. of 8/22/75, filed.
97	Sept. 23	Certified copy of Order from USCA that appellee's motion to remand appeal is DENIED, filed.
98	Sept. 30	Plff's notice of deposition of Mr. James Caterina, filed.
99	Oct. 1	Plff's answers to interrogatories of deft Kennedy Culvert, First Set, filed.
100	Oct. 29	Plff's notice of deposition of Mr. Larry Lawrence, filed.
101	Nov. 26	Deft, Kaiser Aluminum and Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.'s notice of deposition of George Kerr, filed.
102	Dec. 11	Certified copy of Order received from USCA that the judgments of this Court entered 9-9-74, 10-7-74 and 2-6-75 are REVERSED: Costs taxed against appellee, filed.
--	Dec. 11	Record on appeal and two supplements returned.
103	Dec. 24	Memorandum of deft Robert A. Kennedy in support of motion to dismiss for improper venue, filed.
	1976	
104	Jan. 7	Plff's notice of deposition of David Thomas, filed.
105	Jan. 16	Plff's memorandum opposing motion of Robert A. Kennedy to dismiss for improper venue, filed.
106	Feb. 11	ORDER that deft Robert A. Kennedy's motion to dismiss for improper venue is DENIED, filed. EC 2-12-76 entered and copies mailed.
107	Feb. 24	Deposition of Lonsdale R. Lawrence, filed.

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	1976	
108	Mar. 5	Answer of deft., Robert A. Kennedy, filed.
109	Mar. 8	Defts. Robert A. Kennedy et al's notice of taking deposition of Frank Sagendorph, filed.
110	Mar. 17	Plffs notice of deposition of Mr. Ed Rowe, filed.
111	Mar. 25	ORDER that plff's; motion to amend complaint is Granted, and the proposed amended complaint, Exhibit A shall be considered asan amended and supplemental complaint and shall be filed with the title "Amended and supplemental complaint", etd., filed. EC. 3-26-76 entered and copies mailed.
	Mar. 25	AMENDED AND SUPPLEMENTAL COMPLAINT FILED.
112	Apr. 9	Defts, Kennedy and Kennedy Culvert and Supply's amended notice of deposition of Frank Sagendorph, filed.
113	Apr. 30	Answer of Kaiser Aluminum and Chemical Corp. and Kaiswer Aluminum and Chemical Sales, Inc. to amended and supplemental complaint filed.
114	May 3	Answer of deft, Robert A. Kennedy and Kennedy Culvert and Supply Co. to plff's amended complaint, filed.
115	Jun. 24	Deposition of Edward A. Rowe, Jr., filed.
116	July 9	Deft's, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.'s notice of deposition of Kerr Concrete Pipe Co., Inc. etc., filed.
117	July 12	Defts, Kaiser Aluminum & Chemical Corp. et al's notice of deposition of Reynolds Metals Co., etc., filed.
118	June 18	Defts, Kaiser Aluminum & Chemical Corp.

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	1976	
		et al's notice of deposition of Aluminum Co. of America, filed.
119	Aug. 17	Plff's supplemental answers to Kaiser Aluminum's interrogatories, Second Set, filed.
120	Aug. 23	Deposition of Claron E. Parker, filed.
121	Sept. 7	Interrogatories of deft, Kennedy Culvert & Supply Co. to plff, Second Set, filed.
122	Sept. 21	Stipulation of counsel re: entry of Confidentiality Order, filed.
[122]	Sept. 23	CONFIDENTIALITY ORDER that certain documents shall be filed confidentially, etc., filed. EC 9-24-76 entered and copies mailed.
123	Oct. 8	Rule 37 motion to compel Kennedy Culvert & Supply Co. to produce financial statements by plff with memorandum in support, filed.
124	Oct. 8	Plff's interrogatories to defts re expert testimony, filed.
125	Oct. 15	Plff's answers to interrogatories of deft, Kennedy Culvert & Supply Co., Second Set, filed.
126	Nov. 2	Answer of Robert A. Kennedy and Kennedy Culvert & Supply Co. to plff's third set of interrogatories, filed.
127	Nov. 16	Answers of Kaiser Aluminum & Chemical et al to plff's interrogatories re Expert Testimony, filed.
128	Nov. 22	Plff's motion under Rule 37 to compel Kennedy Culver t& Supply Co. to produce financial statment, notice and memorandum of law, filed.
129	Nov. 22	Deft, Kennedy Culvert & Supply Co.'s memorandum of law in opposition to plff's Rule 37 motion, filed.

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130	Nov. 30	ORDER that all discovery shall be completed by 12-31-76; a pretrial conference will be held on 1-18-77 at 9:15 am. and this action is set for jury trial during the month of February, 1977, filed.
		12-1-76 entered - - copies mailed.
131	Dec. 1	Plff's interrogatories, First Set to deft, Kennedy Culvert & Supply Co., filed.
132	Dec. 1	Plff's requests for admissions to deft, Kaiser Aluminum & Chemical Corp., filed.
133	Dec. 1	Plff's request for admission to Kaiser Aluminum & Chemical Sales, Inc., filed.
134	Dec. 7	Plff's notice of deposition of C. E. Parker, filed.
135	Dec. 8	Plff's memorandum in opposition to motions of Kennedy Culvert & Supply Corp., filed.
136	Dec. 8	Deft, Kennedy Culvert's motion to compel plff to answer depositions questions pursuant to F.R.C.P.37(a)(2) and notice thereof, filed.
137	Dec. 8	Defts, Robert A. Kennedy and Kennedy Culvert & Supply Co.'s motion to compel plff to answer interrogatories with notice thereof, filed.
138	Dec. 8	Memorandum of law of defts, Robert A. Kennedy and Kennedy Culvert & Supply Co. in support of their motion to compel plff to be deposed and; to respond to questions on the issue of damages, filed.
139	Dec. 8	Defts, Robert A. Kennedy and Kennedy Culvert & Supply Co.'s memorandum of law in support of their motion to compel answers to interrogatories, filed.
140	Dec. 8	Motion of defts Robert A. Kennedy and Kennedy Culvert & Supply Co. to compel

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	1976	
		plff to be deposed and to respond to questions of the issue of damages pursuant to F.R.C.P. 37 with notice thereof, filed.
141	Dec. 8	Memorandum in support of motion of deft, Kennedy Cuvlvert's for order compelling discovery, filed.
142	Dec. 17	Motion of Kaiser Aluminum & Chemical Corp. for a protective order vacating Columbia Metal Culvert Co., Inc.'s notice of deposition of C. E. Parket, notice and memorandum of law in support; thereof, filed.
143	Dec. 27	Plff's memorandum in opposition to motion for protective order re deposition of C. E. Parker, filed.
144	Dec. 30	Response of Kaiser Aluminum & chemical Sales, Inc. to plff's requests for admissions, filed.
145	Dec. 30	Response of Kaiser Aluminum & Chemical Corp. to plff's requests for admissions, filed.
	1977	
146	Jan. 4	Supplemental answer of plff to deft's expert interrogatories, filed.
147	Jan. 7	Deft's notice of deposition of Ellis Veiser et al, filed.
148	Jan. 17	Supplemental answers of Kaiser Defts to plff's interrogatories re: Expert Testimony, filed.
149	Jan. 18	Plff's motion for protective order re: depositions of Ellis Viezer and Roy Elam, notice and memorandum of law in support, filed.
150	Jan. 18	Plff's notice of deposition of Carlos Chafin, filed.
151	Jan. 21	Answers of deft, Kennedy Culvert & Supply

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		Co. to plff's interrogatories – First Set, filed.
152	Jan. 26	ORDER that this action is removed from the Feb. Trial list and placed on the March list: a further pretrial conference will be held on 3-9-77 at 9:15 a.m.; trial briefs and written requests for instructions to the jury shall be filed by 3-7-77; discovery is reopened and shall conclude on 3-1-77; plff may take the further deposition of C. E. Parker, etc. and Kennedy Culvert & Supply Corp.'s Rule 37 motions are Granted, etc., filed. EC 1-27-77 entered and copies mailed.
153	Feb. 3	Plff's notice of deposition of Dr. Horace I. DePodwin, et al, filed.
154	Feb. 16	Deft, Kennedy Culvert & Supply Co., Inc.'s notice of deposition of Richard Sullivan, filed.
155	Feb. 16	Deft, Kennedy Culvert & Supply Co., Inc.'s notice of deposition of Clifford Rossignol, filed.
156	Feb. 16	Defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.'s notice of deposition of the Monarch Machine Tool, Co. by Urban Buschur, filed.
157	Feb. 22	Plff's notice of deposition of Thomas Melrose, filed.
158	Feb. 23	Plff's notice of deposition of Urban Buschur, filed.
159	Feb. 25	Motion of Plff. for Protective Order re: Depositions of Richard Sullivan and Clifford Rossignol, Notice of, Notice of, Memorandum of Law in support thereof, filed.
160	Feb. 28	Stipulation and Order that transcript of testimony of any employee of U.S Economic

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		Development Administration, etc. shall be designate "CONFIDENTIAL MATERIALS, filed. 3/1/77 entered.
161	Feb. 28	ORDER AMENDING paragraph 2 of the Order filed on 1/26/77 etc., filed 3/1/77 Entered and Copies Mailed
162	Mar. 3	Plff's second suppl. answers to interrogatories, filed.
163	Mar. 8	Videotape deposition of Thomas Melrose, filed.
164	Mar. 8	Plff's notice of deposition of Ken Boedecker, et al, filed.
165	Mar. 15	Plff's trial brief, filed. (Filed under SEAL)
166	Mar. 17	Stipulation of counsel re: Confidentiality Order and ORDER re: the Confidentiality of certain documents, etc., filed. EC 3-17-77 entered and copies mailed.
167	Mar. 17	ORDER that following a PRETRIAL CONFERENCE on 3-11-77 all discovery shall be closed on 3-18-77, etc.; the trial shall be bifurcated with a trial on the issue of liability and a trial on the issue of damages: the parties shall select a jury on 4-11-77, etc., filed. EC 3-18-77 entered and copies mailed.
168	Mar. 18	Plff's notice of deposition of Ken Boedecker, filed.
169	Mar. 21	Plff's notice of deposition of Ken Boedecker, filed.
170	Mar. 21	Plff's preliminary requests for instructions to the jury, filed.
171	Mar. 21	Plff's third supplemental amended answer to

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		Kaiser Aluminum & Chemical corp.'s interrogatories #24, 27 and 28 re: Damages, etc., filed.
172	Mar. 22	Deposition of Carlos H. Chafin taken on behalf of plff, filed.
173	Mar. 28	Plff's motion for reconsideration of the Court's Order of 3-17-77 notice and memorandum of law in support, filed.
174	Apr. 1	Statement of facts of defts, R. A. Kennedy and Kennedy Culvert, filed.
175	Apr. 1	Motion of defts, Robert A. Kennedy and Kennedy Culvert & Supply Co. for partial summary judgment, filed.
176	Apr. 1	Memorandum of Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in opposition to plff's motion for reconsideration of the Court's Order of 3-17-77, filed.
177	Apr. 1	Trail brief of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc., filed.
178	Apr. 4	Plff's notice of deposition of Robert L. Price, filed.
179	Apr. 4	Plff's supplemental memorandum in support of motion for reconsideration of Order of 3-17-77, filed.
180	Apr. 5	Motion of Kaiser Aluminum & Chemical Corp. for a protective order, notice and memorandum of law in support, filed.
181	Apr. 5	Affidavit of Robert L. Price re: motion of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for partial summary judgment, filed.
182	Apr. 7	Videotape deposition of Ken Boedecker, filed.

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183	Apr. 7	Plff's supplemental answers to interrogatories dated 4-4-77, filed.
184	Apr. 7	Motion of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for partial summary judgment, notice, with memorandum of law and appendix in support, filed.
185	Apr 11	Memorandum of defts, Kais er Aluminurn & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in support of withdrawing from the jury the question of relevant product market with appendix, filed.
186	Apr 11	Plff's motion to strike affidavit of Robert L. Price, filed.
187	Apr 11	Plff's designation of genuine issues of material fact for trial with record support re: Kaiser motion for partial summary judgment, filed.
188	Apr 11	Deposition of Richard L. Sullivan, filed.
189	Apr 11	Deposition of Clifford J. Rossignol, filed.
190	Apr 11	Deposition of Holmes Collins, Three Volumes, filed.
191	Apr 11	Deposition (Videotape) of Thomas Melrose, filed.
192	Apr 11	Deposition of David C. Thomas, filed.
193	Apr 11	Deposition of James Caterina, filed.
194	Apr 11	Continuing deposition of Claron E. Parker on 2-23-77, filed.
195	Apr 12	CIVIL JURY TRIAL on 4-11-77: Jury called and sworn, filed. EC
196	Apr 12	Deposition of Joseph A. Bonjourno, filed.
197	Apr 13	Trial resumes on 4-12-77, filed. EC
199	Apr 13	Testimony of Joseph A. Bonjorno on 4-13-77, filed.

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200	Apr 13	Deposition (Video) of Kenneth Boedecker, filed.
201	Apr 13	Copy of deposition of Robert A. Kennedy, filed.
202	Apr 13	Deposition of Philip C. Buchy, Jr., filed.
203	Apr 14	Trial resumes on 4-13-77 - - witnesses sworn, filed. EC
204	Apr 15	Trial resumes on 4-14-77, filed. EC
205	Apr 15	Deposition of Joseph A. Bonjorno, filed.
206	Apr 18	Affidavit of Lee Rosengard re service of subpoena on Edward Mackin on 4-14-77, etc. filed.
207	Apr 18	Affidavit of Lee Rosengard re service of subpoena on Julius J. Luchinsky on 4-14-77, etc., filed.
208	Apr 18	Affidavit of Deborah Dupler re service of subpoena on Frank E. Sagendorph, III, on 4-9-77, etc., filed.
209	Apr 18	Deposition of Richard L. Sullivan, filed.
210	Apr 19	Deposition of Frank Elijah Sagendorph, III, filed.
211	Apr 19	Trial resumes on 4-15-77, filed. EC
212	Apr 19	Trial resumes on 4-18-77, filed. EC
213	Apr 20	Trial resumes on 4-19-77, filed. EC
214	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Bart Flannery on 4-15-77, filed.
215	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Charles Gianusso on 4-15-77, filed.
216	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Ernest Lo Furno on 4-15-77,; filed
217	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Victor Pangia on 4-15-77, filed.
218	Apr 20	Affidavit of Lee Rosengard re: service of

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		subpoena on R. W. Krauss on 4-15-77, filed.
219	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Martin Ettorre on 4-15-77, filed.
220	Apr 21	Trial resumes on 4-20-77, filed.
221	Apr 25	Trial resumes on 4-21-77, filed. EC
222	Apr 26	Trial resumes on 4-25-77, filed. EC
223	Apr 27	Trial resumes on 4-26-77, filed. EC
224	Apr 28	Motion of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for a directed verdict pursuant to Rule 50(a), and memorandum of law in support, filed.
225	Apr 28	Trial resumes on 4-27-77, filed. EC
226	May 2	Transcript of testimony on 4-12-77, filed.
227	May 2	Transcript of testimony on 4-13-77, filed.
228	May 2	Transcript of testimony on 4-14-77, filed.
229	May 2	Transcript of testimony on 4-15-77, filed.
230	May 2	Transcript of testimony on 4-18-77, filed.
231	May 2	Transcript of testimony on 4-19-77, filed.
232	May 2	Transcript of testimony on 4-20-77, filed.
233	May 2	Transcript of testimony on 4-21-77, filed.
234	May 2	Transcript of testimony on 4-25-77, filed.
235	May 2	Transcript of testimony on 4-26-77, filed.
236	May 2	Transcript of testimony on 4-27-77, filed.
237	May 2	Transcript of testimony on 4-28-77, filed.
238	May 2	Trial resumes on 4-28-77, filed. EC
239	May 2	Trial resumes on 5-2-77 - - Rule 50 motion by defts is GRANTED and Judgment to be entered in favor of the defts and against the plff, filed. EC
240	May 2	ORDER that judgment is entered in favor of the defts, Kaiser Industries Corp. et al and against the plff, Columbia Metal Culvert Co., Inc., filed. EC.Clk

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		5-3-77 entered and copies mailed.
241	May 3	Transcript of 5-2-77, filed.
242	May 11	Defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, INc.'s Bill of Costs with affidavit in support, filed.
243	May 12	Plff's objection to Bill of Costs, filed.
244	May 19	Defts, Robert A. Kennedy and Kennedy Culvert & Supply Co.'s Bill of Costs with affidavit in support, filed. (77-1846)
245	May 20	Plff's notice of appeal and certificate of service, filed.
		5-23-77 entered and copies to: USCA, C. Hodgson & Blank, Rome, Klaus and Comisky
246	May 20	Copy of Clerk's Notice of appeal to USCA, filed.
247	May 24	Plff's objections to Bill of Costs of defts Robert A. Kennedy and Kennedy Culver t & Supply Co., filed.
248	June 9	Deposition of Robert A. Kennedy on 5-7-75, filed.
--	June 9	Original record transmitted to USCA. Not including papers #43, 62, 63, 67, 97, 128, 199, 242, 243, 244, 247, (#49 and 198--no paper assigned), (#163 and 182--Video Tape Depositions). (Paper #165 is UNDER SEAL).
--	July 1	Bond for Costs on Appeal in the sum of $250 with Fidelity and Deposit Co. of Maryland as surety, filed.
249	July 20	MEMORANDUM OPINION, Cahn, J., filed. (22 pags.) EC
		7-21-77 entered and copies mailed.
--	July 22	First supplemental record transmitted to

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		USCA. (Record includes only paper #249)
250	Dec 28	Index to plff's trial exhibits, filed.
--	Dec 29	Second supplemental record transmitted to U.S.C.A. (Exhibits--Plff's Trial Exhibits #3, 4, 5, 8A, 10, 11, 13, 15, 16, 21, 22, 24, 30, 75, 76, 78, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 100, 101, 109, 110, 116, 117, 133, 139, 140, 143, 144, 145, 146, 151A, 152, 154, 155, 159, 160, 161, 162, 169, 170, 177, 179, 182, 182A, 184, 186, 188, 189, 194, 195, 199, 200, 201, 202, 203, 221, 222, 226, 227, 229, 257, 259, 263, 267A, 272A, 273, 274, 275, 276, 277, 278, 280, 281, 282, 283, 284, 287, 288, 549, 732G, 865, 916, 917, 924, 940, 947, 948, 950, 951, 954, 955, 956, 957, 962, 966 and 969: P-196, P-197, P-200, P-211, P-201, P-202, P-212, P-226, P-227, P-840, P-839, P-842, P-841, P-838, P-837, P-836, P-838B, P-2001, P-2002, P-2003 a & b, P-2006-2008, P-2009 a & b, P-2011-2013, P-2016, P-2018, P-2021, P-2028, P-2030, P-2031A, P-2032, P-2033, P-2034, P-2035, P-272, P-272 a, b & c, P-288, P-823, P-230, P-262, P-264, P-268, P-290, P-2036, P-2036A, P-2037 and P-2038.)
1978		
251	Mar 21	Certified copy of Order from U.S. Court of Appeals GRANTING appellant's motion for leave to the District Court to correct the record in accordance with Rule 60(a), by changing Mr. Arvay's answer on page 1550 of the trial transcript from "Yes, really," to "Yes, rarely." filed.
252	July 7	Certified copy of Order U.S. Ct. Appeals,

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		dated 7/6/78 that motion of appellant Columbia Metal Culvert Co., Inc. for reconsideration and vacation or modification of the Order of 6/29/78 et al., is denied, filed.
253	Jul 26	Plff's Motion for Pretrial Conference & for Preliminary Injunction, Notice, & Memorandum in support of both Motions, filed.
254	Jul 26	Deft's Memorandum in opposition to Plff's Motions, filed.
255	Aug 4	Affidavit of William H. Roberts, filed.
--	Oct 12	ORIGINAL RECORD and 2 supplements returned; Trial Transcript Nos. 227, 229, 230, 235 & 236, plft's. exhibits marked P-288 and impounded document No. 165 will be returned when they are received back from U.S. Supreme Court; petition for certiorari was denied 10/2/78.
256	Oct 12	Certified copy of ORDER that the judgment of the district court filed 5/2/77 is affirmed as to defts. Kennedy Culvert and Robert Kennedy; as to KACC and KACSI, judgment of the District Court is affirmed insofar as it granted a directed verdict against plfts. on the Clayton Act claims; the remainder of said judgment of the District Court is reversed, and the cause remanded for action consistent with the opinion of the U.S. Court of Appeals, filed. USCA
--	Oct 18	Trial transcripts Nos. 227, 229, 230, 235 and 236, plft's. exhibits marked P-288 and impounded document No. 165 received from U.S. Court of Appeals.
257	Oct 20	ORDER, that the case be reassigned from the calendar of Judge Edward N. Cahn to the calendar of Judge Norma L. Shapiro,

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		filed. JL/clk 10/20/78 entered & copies mailed
258	Oct 20	Plft's. supplemental rule 34 request for production of documents, filed.
259	Oct 20	Plft's. renewed motion for pretrial conference, notice, renewed motion for preliminary injunction, memorandum, filed.
260	Oct 20	ORDER that case be reassigned from the calendar of Judge Edward N. Cahn to the calendar of Judge Norma L. Shapiro, filed. JS/mek 10/23/78 entered & copies mailed.
261	Oct 24	Memorandum of Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in opposition to plft's. meotion for a preliminary injunction, filed.
262	Oct 26	Plft's. reply brief, filed.
263	Nov 7	Plft's. supplemental brief, with affidavit of Joseph A. Bonjorno, filed.
264	Nov 9	Report of pretrial conference, Shapiro, J.
--	Nov 9	PRETRIAL CONFERENCE HELD, Shapiro, J.
265	Nov 10	ORDER, dated 11/10/78 that discovery shall be completed by 1/31/79; plft. has leave to file an amended or supplemental complaint, etc., parties shall be ready for pretrial conference and preliminary injunction argument 12/21/78 at 11 AM, Rm. 10614, etc., filed. NS 11/13/78 entered & copies mailed.
266	Dec 7	SECOND AMENDED AND SUPPLEMENTAL COMPLAINT, filed.
267	Dec 19	Defts' notice of deposition of Joseph A. Bonjorno, et al., filed.
268	Dec 21	Deft's. supplemental request for production

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		of documents, set No. 1, filed.
269	Dec 21	Plft's. notice of deposition of Custodian of Records of Reynolds Metals Co., filed.
270	Dec 21	Plft's. notice of deposition of Walter R. Haidet, et al., filed.
271	Dec 21	Plft's. notice of deposition of Custodian of Records of Kennedy Culvert & Supply Co., filed.
272	Dec 27	Report of Pretrial conference of 12/21/78, filed.
273	Dec 28	STIPULATION AND ORDER DATED 12/21/78 THAT THE TIME IN WHICH DEFTS. MAY ANSWER, MOVE OR OTHERWISE RESPOND TO THE SECOND AMENDED COMPLAINT IS EXTENDED UNTIL 1/7/79, FILED. 12/28/78 entered and copies mailed
274	Dec 28	ORDER THAT A STATUS/SETTLEMENT CONFERENCE WILL BE HELD ON 2/5/79 AT 4:30 PM. PLFF'S MOTION FOR PRELIMINARY INJUNCTION IS WITHDRAWN, PLFF. WILL PROVIDE THE COURT AND OPPOSING COUNSEL WITH INFORMATION ON DAMAGES BY 1/31/79. THE COURTS ORDER OF 11/10/78 is modified in that trial is scheduled for 6/5/79 OR SOONER IF POSSIBLE, FILED. NS 12/29/78 entered and copies mailed
1979		
275	Jan 5	ANSWER of defts. Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. to second amended and supplemental complaint, filed.

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276	Jan 5	Defts' notice of deposition of William Bowman, et al., filed.
277	Jan 9	Plft's. amended notice of deposition of Mr. Carlos Chafin, filed.
278	Jan 17	Plft's. notice of deposition of Francis Lombardi, filed.
279	Jan 17	Plft's. notice of deposition of Robert Kennedy, filed.
280	Jan 25	Plft's. response to defts' supplemental request for production of documents – set #1, filed.
281	Jan 25	Stipulation between counsel for plft. and defts. that documents produced by Kennedy Culbert & Supply Co. from 1/15/79 thru the final termination of the action are produced subject to stipulation of confidentiality heretofore executed (Docket No. 40), etc., filed.
282	Jan 30	Defts' supplemental interrogatories, Set No. 1.
283	Jan 31	Defts' supplemental request for production of documents, set No. 2, filed.
284	Jan 31	Plft's. damages statement, filed.
285	Feb 2	Plft's. supplemental request for documents, filed.
286	Feb 2	Plft's. amended damages statement (Feb. 1, 1979), filed.
287	Feb 7	Plft's. objection to deft's. supplemental interrogatories, set No. 1, filed.
~~288~~	~~Feb 14~~	~~PLFT'S. MOTION FOR ORDER COMPELLING DEFTS. TO PRODUCE DOCUMENTS, NOTICE, MEMORANDUM, filed.~~ (see Paper #293)

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289	Feb 14	DEFTS' MEMORANDUM IN OPPOSITION TO PLFT'S. MOTION FOR AN ORDER COMPELLING DEFTS. TO PRODUCE DOCUMENTS, filed.
290	Feb 20	Plft's. memorandum in opposition to bill of costs of Robert A. Kennedy and Kennedy Culvert & Supply Co., filed.
291	Feb 22	Report of pretrial conference, Shapiro, J., filed.
--	Feb 22	PRETRIAL CONFERENCE HELD 2/15/79, Shapiro, J.
292	Feb 23	ORDER, DATED 2/22/79, THAT DISCOVERY SHALL BE COMPLETED BY 3/15/79, ETC., FINAL PRETRIAL CONFERENCE TO BE HELD 4/20/79 at 4:30 PM, ETC., filed. NS 2/23/79 entered & copies mailed.
293	Feb 23	ORDER, DATED 2/22/79, THAT MOTION, DOCKET #288 SHALL BE STRICKEN AND RETAINED UNDER SEAL, ETC., filed. NS 2/23/69 entered & copies mailed.
294	Feb 27	Letter dated 2/21/79 to Chief Deputy Clerk, Mr. Kunz, from Lee A. Rosengard Esq Re: Taxation of costs, etc., filed
295	Feb 27	Letter dated 2/26/79 to Chief Deputy Clerk, Mr. Kunz, from Michael M. Baylson Esq., re: Taxation of Costs, etc., filed.
296	Feb 28	Defts' notice of deposition of Howmet Aluminum Corp., filed.
297	Mar 1	Plft's. notice of deposition of Custodian of Records of Reynolds Metals Co., filed.
298	Mar 5	KAISER ALUMINUM & CHEMICAL

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		CORP., ET AL'S. MOTION FOR AN ORDER COMPELLING ANSWERS TO INTERROGATORIES AND COMPELLING PRODUCTION OF DOCUMENTS, NOTICE, MEMORANDUM, filed.
299	Mar 9	PLFT'S. MEMORANDUM IN OPPOSITION TO DEFT'S. MOTION FOR ORDER COMPELLING ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS, filed.
300	Apr 20	Report of pretrial conference, Shapiro, J., filed.
--	Apr 20	PRETRIAL CONFERENCE HELD, Shapiro, J.
301	Apr 26	ORDER DATED 4/24/79 THAT COUNSEL FOR PLFT. SHALL DESIGNATE PAGES OF DEPOSITIONS HE INTENDS TO OFFER AT TRIAL BY 6/1/79, ETC., A STATUS CONFERENCE WILL BE HELD 6/4/79 at 4 PM, filed. NS 4/27/79 entered & copies mailed.
302	May 17	PLFF'S MOTION FOR ORDER COMPELLING DISCOVERY, NOTICE, MEMORANDUM FILED.
303	May 17	DEFTS' MEMORANDUM IN OPPOSITION TO PLFT'S. MOTION TO TAKE DEPOSITIONS OF EXPERT WITNESSES, filed.
304	May 25	Plft's. answer to defts' supplemental interrogatory #1, filed (UNDER SEAL) (placed in lockup)
305	May 30	PLFT'S. REPLY BRIEF IN SUPPORT OF MOTION FOR ORDER COMPELLING DISCOVERY (DEFTS' EXPERTS), filed.
306	June 1	Plft's. designation of deposition testimony for

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		use at trial, filed.
307	June 6	ORDER, DATED 6/5/79 THAT PLFT'S. MOTION TO DEPOSE DEFTS' EXPERT WITNESSES WITHOUT COSTS IS DENIED; DEFTS. ARE ORDERED TO SUPPLEMENT THEIR ANSWERS TO PLFT'S. EXPERT INTERROGATORIES., ETC., THE COURT WILL HOLD A PRETRIAL CONFERENCE ON 7/5/79 at 9:30 A.M., ETC., filed. 6/7/79 entered & copies mailed.
308	June 7	Report of pretrial conference, Shapiro, J., filed.
--	June 7	PRETRIAL CONFERENCE HELD 6/4/79, Shapiro, J.
309	June 8	Plft's. notice of depositions of James Hobby, et al., filed.
310	June 15	Deposition of David C. Jones, filed.
311	June 29	Plft's. supplemental designations of deposition testimony, filed.
312	June 29	Defts' counter-designation of testimony for use at trial, filed.
313	July 3	Defts' supplemental designation of deposition testimony for use at trial, filed.
314	July 5	Plft's. motion for sanctions, filed.
315	July 5	Plft's. proposed questions on voir dire, filed.
316	July 5	Plft's. proposed interrogatories to jury, filed.
317	July 5	Plft's. supplement to second final pretrial order, filed.
318	July 5	Plft's. preliminary requests for instructions to the jury, filed
319	July 5	Plft's. supplemental trial brief, filed.
320	July 6	Deft's Kaiser Aluminum & Chemical Corp., et al's requested jury instructions, filed.
321	July 6	Supplemental answers of Kaiser Deft's to

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		plff's interrogatories re: expert testimony, filed.
322	July 6	Preliminary proposed form of special verdict of deft's Kaiser Aluminum & Chemical Corp., et al, filed.
323	July 12	PLFT'S. MOTION FOR PRECLUSION ORDER OR OTHER SANCTIONS, NOTICE, MEMORANDUM, filed.
324	July 13	Plft's. amended damage statement 7/13/79, filed.
325	July 13	Plft's. tentative order of witnesses, filed.
326	July 13	DEFTS' MEMORANDUM IN OPPOSITION TO PLFT'S. MOTION FOR PRECLUSION ORDER AND OTHER SANCTIONS, filed.
327	Jul 13	DEFTS' KAISER ALUMINUM & CHEMICAL CO. MOTION IN LIMINE & MEMORANDUM IN SUPPORT, filed
328	Jul 13	DEFTS " witnesses, filed
329	Jul 13	CLERK'S TAXATION OF COSTS, RE THAT JUDGMENT IS ENTERED IN FAVOR OF DEFTS' ROBERT A. KENNDEY AND KENNEDY CULVERT & SUPPLY CO. AND AGAINST THE PLFF. COLUMBIA METAL CULVERT IN THE AMOUNT OF $4,647.64, filed MEK 7/16/79 entered & copies mailed
330	Jul 16	Deposition of James B. Hobby, filed
331	Jul 17	PLFF'S MOTION FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS & MEMORANDUM OF LAW, filed
332	Jul 17	Plff's notice of taking deposition of Barbara Epstein, filed

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333	Jul 17	Additional plff's exhibits re; William Arvay, filed
334	Jul 17	Plff's objections to counter-designations by deft. H.T. Collins testimony, filed
335	Jul 17	Plff's memorandum of law, filed
--	Jul 5	Report of pre-trial conference, SHAPIRO, J.
336	Jul 18	PRE-TRIAL CONFERENCE, SHAPIRO, J, filed
337	Jul 18	CIVIL JURY TRIAL, jury called & sworn on 7/17/79, on issue of liability – bifurcated, filed NS
338	Jul 19	Oral deposition of Robert A. Kennedy, filed.
339	Jul 19	Deposition of Kenneth Richard Lally, filed.
340	Jul 19	Deposition of Walter R. Haidet, filed.
341	Jul 19	Deposition of Allan J. Donald, filed.
342	Jul 19	Deposition of Francis T. Lombardi, filed.
343	Jul 19	TRIAL RESUMES 7/18/79, filed.
344	Jul 19	COLUMBIA METAL CULVERT CO., INC.'S. MOTION TO VACATE CLERK'S TAXATION OF COSTS AND FOR A DE NOVO REVIEW OF THE BILL OF COSTS BY THE COURT, filed.
345	Jul 19	Deposition of Carol Herman, filed.
346	Jul 19	Deposition of Carlos H. Chafin, filed.
347.	Jul 20	TRIAL RESUMES ON 7/19/79: Witness continues, filed. (NS)
348.	Jul 20	TRIAL RESUMES ON 7/20/79: Witness continues, filed. (NS)
349	Jul 25	Plff's supplemental designation, counter designation of deposition testimony and objections to designations, filed.
350	Jul 25	TRIAL RESUMES ON 7/23/79, witnesses sworn, trial continues, filed (NS)
351	Jul 26	TRIAL RESUMES 7/24/79, filed.

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352	Jul 26	PLFF'S MOTION FOR ORDER TO PRODUCE DOCUMENTS & MEMORANDUM OF LAW, filed
353	Jul 27	Praecipe for writ of execution as to Kaiser Aluminum & Chemical Corp et al, filed
–	Jul 27	Writ Exit.
354	Jul 27	MOTION AND ORDER SPECIALLY APPOINTING C. CLARK HODGSON TO SERVE WRIT, FILED. 7/27/79 entered & copies with writ to counsel MEK-CLK
355	Jul 27	Interrogatories in attachment to Kaiser Aluminum & Chemical Corp et al, filed.
356	Jul 27	TRIAL RESUMES, witnesses sworn 7/25/79, filed
357	Jul 30	TRIAL RESUMES, trisl continued as of 7/26/79, filed
358	Jul 30	Deft. Kaiser Alum. & CHemical Corp.'s reply to plff's supplemental trial brief, filed
359	Jul 31	TRIAL RESUMES, witnesses sworn on 7/27/79, filed
360	Aug 1	Memorandum of law of Kaiser Aluminum & Chemical Corp et al regarding Alleged Dam filed
361	Aug 1	Trial of 7/30/79 resumes, filed.
362	Aug 1	Trial of 7/31/79 resumes, filed.
363	Aug 2	MOTION OF KAISER ALUMINUM ET AL FOR A DIRECTED VERDICT PURSUANT TO RULE 50(a), FILED
--	Aug 1	SETTLEMENT CONFERENCE, Shapiro, J.
364	Aug 2	Report of settlement conference, Shapiro, J., filed
365	Aug 3	Trial of 8-1-79 resumes filed.
366	Aug 6	Plff's memorandum in support of motion to

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		exclude defts' exhibits D-3049 thru D-3060 filed.
367	Aug 7	Trial of 8/2/79 resumes, filed.
368	Aug 7	Trial of 8/3/79 resumes, filed.
369	Aug 9	Trial of 8/6/79 resumes filed.
370	Aug 9	Trial of 8/6/79 resumes filed.
371	Aug 9	Defts' memorandum in opposition to request to exclude certain exhibit filed.
372	Aug 10	Trial of 8/8/79 resumes, filed.
373	Aug 13	Kaiser Aluminum & Chemical Corp et al supplemental requests for Jury instructions, filed.
374	Aug 14	Trial of 8/9/79 resumes, filed.
375	Aug 14	Trial of 8/10/79 resumes, filed.
376	Aug 14	Trial of 8/13/79 resumes, filed.
377	Aug 14	Plff's supplemental points for charge — Liabiltiy, filed.
378	Aug 16	Trial resumes on 8-14-79, filed.
379	Aug 16	Trial resumes on 8-15-79, filed.
380	Aug 16	ORDER DATED 8-16-79 THAT THE U.S. MARSHAL FURNISH LUNCH FOR 11 JURORS AND ONE DEPUTY MARSHAL, FILED. NS.Clk 8-17-79 entered
381	Aug 17	Plff's supplemental points and authorities re: Damages, filed.
382	Aug 17	Plff's supplemental points for charge — Damages, filed.
383	Aug 17	Interrogatories to the jury filed.
384	Aug 17	Jury trial resumes (8/16/79); Deputy Marshal sworn; verdict by answering interrogatories in favor of pltf; trial on issue of damages to be held on 8/17/79, filed.
385	Aug 22	Trial resumes (7/20/79), filed.
386	Aug 22	Trial resumes & 7/21/79); deputy marshal

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		sworn; verdict on damages by answering interrogatories, filed.
387	Aug 22	Trial resumes (8/17/79), filed.
388	Aug 22	Interrogatories to the jury, filed.
389	Aug 22	ORDER DATED 8/21/79 THAT POST-TRIAL MOTIONS ARE TO BE FILED WITHIN 10 DAYS AFTER ENTRY OF JUDGMENT; THAT MEMORANDUMS OF LAW IN OPPOSITION TO POST-TRIAL MOTIONS MUST BE SERVED & FILED WITHIN 5 DAYS OF SERVICE & FILING OF THE MOVING PARTY'S MEMORANDUM, FILED 8/22/79 entered and copies mailed. NS
390	Aug 22	JUDGMENT DATED 8/21/79 IN FAVOR OF PLTF AND AGAINST DEFTS, KAISER ALUMINUM AND CHEMICAL CORP. & KAISER ALUMINUM & CHEMICAL SALES, INC. IN THE SUM OF $5,445,000.00, FILED. Clk. NS 8/22/79 entered and copies mailed.
391	Aug 27	STIPULATION & ORDER EXTENDING TIME FOR DEFTS TO FILE POST TRIAL MOTIONS & BRIEFS TO 9/19/79, ETC., FILED. NS 8/28/79 entered & copies mailed.
392	Sept 6	Defts' requested jury instructions, filed.
393	Sept 19	DEFTS' MOTION FOR A NEW TRIAL, FILED.
394	Sept 19	DEFTS' MOTION FOR JUDGMENT NOT WITHSTANDING VERDICT, FILED.
395	Sept 20	Deft.'s notice of appeal received 9/20/79 at 2:30 p.m., filed. 9/21/79 copies to:

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		Michael M. Baylson, Esq. Henry T. Reath, Esq. Blank, Rome, Klaus & Cominsky certified copy of docket entries & notice of appeal to U.S.C.A.
--	Sept 20	Bond for costs on appeal in the sum of $250.00 with the Fidelity & Deposit Company of Maryland, filed.
396	Sept 20	Copy of Clerk's notice to U.S.C.A., filed. 9/21/79 copies to: Michael M. Baylson, Esq. Henry T. Reath, Esq. Blank, Rome, Klaus & Cominsky Judge Shapiro Paul Buttery Daniel Spitz
397	Sept 28	DEFTS' MOTION FOR EXTENSION OF TIME FOR TRANSMISSION OF RECORD, FILED.
398	Oct 3	Response of Plff. to motion for new trial and for a judgment notwithstanding the verdict, filed.
399-418	Oct 4	Trial transcripts, 20 volumes, filed.
419-422	Oct 5	Trial transcripts, 4 volumes, filed.
--	Oct 9	ORIGINAL RECORD TRANSMITTED TO U.S.C.A. (Pleadings #43, 62, 63, 67, 165, 199, 235, 260, 274, 293, 304, 330, 340, 341, 342, 389, 393, 394, 397 & 398 not included) (USCA 79-2389)
423	Oct 9	ORDER DATED 10/5/79 THAT DEFTS' MOTION FOR EXTENSION OF TIME FOR TRANSMISSION OF RECORD IS DENIED WITHOUT PREJUDICE, FILED. NS 10/10/79 entered & copies mailed.

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424	Oct 9	Kaiser's reply to Columbia's response to post-trial motions, filed.
425	Nov 14	DEFTS' MOTION FOR SUPERSEDEAS BOND, FILED.
---	Nov 16	Supersedeas bond in the sum of $5,445,000.00 with the Insurance Company of America as surety, with court approval, filed.
(425)	Nov 19	ORDER APPROVING SUPERSEDEAS BOND, FILED. 11/20/79 ENTERED & COPIES MAILED
426	Nov 20	CERTIFIED COPY OF ORDER FROM U.S.C.A. THAT APPELLANTS' MOTION FOR A LIMITED REMAND TO U.S.D.C. JUDGE SHAPIRO FOR THE PURPOSE OF DETERMINING KAISER'S MOTION FOR JUDGMENT NOT WITHSTANDING VERDICT AND MOTION FOR NEW TRIAL FILED BY KAISER, ETC., IS GRANTED., FILED. USCA
--	Nov 20	RECORD ON APPEAL RETURNED.
427	Dec 7	ORDER DATED 12/6/79 THAT DEFTS' BRIEF IN SUPPORT OF POSTTRIAL MOTIONS SHALL BE FILED BY 1/3/80, ETC., FILED. 12/10/79 entered & copies mailed. NS
428	Dec 26	ORDER THAT THE COURT HEREBY RETAXES A JUDGMENT FOR COSTS IN FAVOR OF DEFTS., ROBER A. KEENDY AND KENNEDY CULVERT & SUPPLY COMPANY AND AGAINST PLFF., COLUMBIA METAL CULVERT CO., INC. IN THE SUM OF $4,647.64, filed. 12/27/79 entered & copies mailed. NS

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429	Dec 27	Defts' brief in support of motions for judgment N.O.V. or for a new trial, filed.
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430	Jan 3	ORDER THAT THE ORDER OF DECEMBER 6, 1979, SETTING FORTH A BRIEFING SCHEDULE FOR DEFTS' POST TRIAL MOTIONS, IS MODIFIED IN THAT PLFF'S BRIEF IN OPPOSITION TO DEFTS' POST TRIAL MOTIONS SHALL BE FILED AND SERVED ON OR BEFORE JAN. 18, 1980, AND DEFTS SHALL HAVE TEN (10) DAYS TO FILE AND SERVE A REPLY BRIEF. ORAL ARGUMENT IS SCHEDULED FOR FEB. 27, 1980 AT 4:00 P.M. AS PREVIOUSLY ORDERED, FILED NS 1/3/80 ENTERED & COPIES MAILED
431	Jan 18	Plff's brief in opposition to defts' motions for judgment N.O.V. or for a new trial, filed.
432	Jan 21	Transcript of 8/15/79, filed.
433	Jan 21	Transcript of 8/16/79, filed.
434	Jan 21	Transcript of 8/21/79, filed.
435	Feb 1	Defts' reply brief in support of motions for judgment N.O.V. or for a new trial, filed.
436	May 2	Transcript of 7/20/79, filed.
437	May 12	PLFF'S MOTION FOR SUBSTITUTION OF PARTIES, NOTICE, MEMORANDUM OF LAW FILED.
(437)	May 30	ORDER THAT UPON THE LIQUIDATION AND DISSOLUTION OF COLUMBIA METAL CULVERT CO., INC. JOSEPH A. BONJORNO, GEORGE M. KERR, JR. AND BARBARA K. CLISBY WILL BE SUBSTITUTED AS PARTIES PLFF. IN PLACE OF COLUMBIA

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		METAL CULVERT CO., INC., ETC., FILED. 6/2/80 entered & copies mailed. NS
438	Jul 25	Writ returned with affidavit of C. Clark Hodgson, Jr., Esq., re: mailed on 8-7-80, filed.
439	Dec 2	ORDER DTD. 12/1/80 THAT A SUPPLEMENTAL ORAL ARGUMENT ON OUTSTANDING MOTIONS WILL BE HELD ON 1/29/81 AT 9:00 A.M, FILED. NS 12/3/80 entered & copies mailed.
440	Dec 5	ORDER THAT ORAL ARGUMENT ON OUTSTANDING MOTIONS SCHEDULED FOR 1/29/81 HAS BEEN CHANGED TO 12/29/80 AT 10:00 A.M. IN CTRM. 10-A, FILED. 12/8/80 entered & copies mailed. NS/clk
441	Dec 23	Pltf's statement of issues for supplemental oral argument, filed.
442	Dec 23	Pltf's appendix to statement of issues for oral argument, filed.
443	Dec 24	Pltf's statement of issues for supplemental oral argument, filed. (revised)
444	Dec 30	ORAL ARGUMENT 12/29/80 SUR: C.A.V., filed.
445	Dec 30	Defts Kennedy & Robert A. Kennedy & Culvery & Supply Co.'s notice of deposition of Joseph A. Bonjorno, filed.
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446	Jan 6	PLTF'S MOTION FOR PROTECTIVE ORDER, NOTICE, MEMORANDUM OF LAW, FILED.
447	Jan 7	Defts' memorandum of law in opposition to pltfs' motion for a protective order,

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448	Jan 13	Pltfs' reply brief in support of Motion for protective order, filed.
449	Jan 21	Pltf, Joseph Bonjorno's objections to request for production of documents attached to notice of deposition, filed.
450	Jan 22	ORDER THAT A CONF. IS SCHEDULEF FOR 2/13/81 AT 9:30 a.m. IN CHAMBERS, FILED. NS/clk 1/22/81 entered & copies mailed.
451	Jan 23	ORDER THAT THE CONF. SCHEDULEF FOR 2/13/81 HAS BEEN CHANGED TO 2/5/81 AT 10:00 a.m. IN CHAMBERS, FILED. NS/clk 1/26/81 entered & copies mailed.
452	May 22	PLFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, NOTICE OF, MEMORANDUM OF, LAW, FILED. (SUPPLEMENTAL BRIEF ATTACHED)
453	may 29	Defts' answer to Motion for Leave to file Supplemental Brief re: J. Truett Payne v Chrysler Motors Corp., filed.
454	May 29	Defts' brief in answer to plffs' supplemental brief, filed.
455	Jun 18	MEMORANDUM, SHAPIRO, J., AND ORDER THAT PLFF'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IS GRANTED, THE MOTION OF KAISER ALUMINUM & CHEMICAL CORP., ET AL FOR JUDGMENT N.O.V. IS GRANTED WITH RESPECT TO THE JURY AWARD OF $57,000 IN RESPONSE TO INTERROGATORY ONE AS TO DAMAGES AND OTHERWISE DENIED, DEFTS MOTION FOR A NEW TRIAL IS GRANTED AS TO DAMAGES ONLY,

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		FIXING 7-17-81 AT 1:00 P.M. FOR A PRE-TRIAL/STATUS CONFERENGE, ETC., FILED. 6-18-81 Entered and copies mailed.
456	Jun 18	ORDER THAT THE CLER OF THE DISTRICT COURT SHALL CERTIFY A COPY OF THE DOCKET ENTRIES TOGETHER WITH THE MEMORANDUM OF 6-17-81 TO THE CLERK OF THE COURT OF APPEALS, THE CLERK OF THE DISTRICT COURT SHALL RETAIN THE RECORD SUBJECT TO THE REQUEST OF THE COURT OF APPEALS PENDING A DECISION ON THE MOTION TO REVOKE LIMITED REMAND, FILED. 6-18-81 Entered and copies mailed.
---	Jun 18	Supplemental record on appeal transmitted to U.S. Court of Appeals
457	Jun 26	Certified copy of order received from U.S.C.A. DENYING THE MOTION OF APPELLEE, COLUMBIA METAL CULVERT CO., INC. TO SUBSTITUTE AS APPELLEES, JOSEPH A. BONJORNO ET AL ETC., FILED 6/29/81 ENTERED & COPY TO JUDGE SHAPIRO
458	Jun 29	PLFF'S MOTION FOR RECONSIDERATION, NOTICE, MEMORANDUM OF LAW, & CERTIFICATE OF SERVICE, FILED.
459	Jul 7	Kaiser's brief in opposition to Columbia's motion for reconsideration, filed.
460	Jul 13	CERTIFIED COPY OF ORDER OF USCA DENYING MOTION OF COLUMBIA

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		METAL CULVERT CO., INC. FOR RETURN OF THE FULL RECORD TO THIS COURT FOR DISPOSITION: GRANTING APPELLANTS MOTION FOR DISMISSAL OF APPEAL, FULL REMAND OF CASE TO DISTRICT JUDGE SHAPIRO WITH CERTAIN INSTRUCTION, AND STAY OF ANY ATTEMPTED EXECUTION BY COLUMBIA ON JUDGMENT BELOW ENTERED ON 8-22-79 IN FAVOR OF COLUMBIA AND AGAINST KAISER UNTIL COURT BELOW HAS ORDERED JUDGMENT OF 8-22-79 VACATED, FILED.
461	Jul 14	Reply brief in support of motion for reconsideration, filed.
462	Jul 16	ORDER VACATION JUDGMENT IN THE SUM OF $5,445,000.00 ENTERED 8-22-79 IN FAVOR OF COLUMBIA METAL CULVERT CO., INC. AND AGAINST KAISER ALUMINUM AND CHEMICAL CORP. AND KAISER AND CHEMICAL SALES, INC., FILED. 7/17/81 ENTERED AND COPIES MAILED.
463	Jul 17	Kaiser's preposed pre-trial procedure for retrial on damages, filed.
464	Jul 24	Plff's memo on procedure at retrial on damages, filed.
465	Jul 24	Plff's proposed statement, filed.
466	Jul 28	Kaiser's memo in opposition to plff's memo on procedure at retrial on damages, fil
467	Aug 6	ORDER THAT PLFF. SHALL SUBMIT STATEMENT ON DAMAGES ON OR BEFORE 8/17/81., DEFT. SHALL FILED

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		STATEMENT ON DAMAGES ON OR BEFORE 8/27/81., ETC., A PRETRIAL CONFERENCE WILL BE HELD ON 8/19/81 AT 10:00 A.M., FILED. 8/7/81 ENTERED AND COPIES MAILED.
468	Aug 10	PLFFS' MOTION TO WITHDRAW REQUEST FOR INTERLOCUTORY APPEAL, FILED.
469	Aug 31	ORDER THAT PLFFS. MOTION TO WITHDRAW INTERLOCUTORY APPEAL IS GRANTED, FILED. 8/31/81 ENTERED AND COPIES MAILED.
470	Sept 10	Plffs' Pre-Trial statement, re: damages, filed.
471	Sept 14	PLFFS' MOTION FOR PROTECTIVE ORDER, NOTICE, MEMO, FILED.
472	Sept 17	ORDER THAT CASE IS SPECIALLY LISTED FOR TRIAL ON 11/16/81 AT 10:00 A.M., FILED. 9/17/81 ENTERED AND COPIES MAILED.
473	Sept 18	Certificate of service of Michael M. Baylson, esq., re" service of Motion for protective order, filed.
474	Sept 21	Amendments to plffs' pre-trial statement, filed.
475	Oct 6	DEFTS MOTION FOR SUMMARY JUDGMENT AND FOR PRECLUSION OF PROOF OF DAMAGES, MEMO, CERTIFICATE, FILED.
476	Oct 6	PLFFS MOTION TO ADD ONE WITNESS TO PLFF'S WITNESS LIST, MEMO, CERTIFICATE OF SERVICE, FILED.

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477	Oct 9	Certificate of service of motion of defts for summary judgment, etc. filed.
478	Oct 13	Defts memo, in opposition to motion to add one witness to witness list, filed.
479	Oct 19	Plffs response to motion for summary judgment and for preclusion of proof of damages, filed.
480	Oct 19	Plffs reply brief in support of motion to add one witness to plffs witness list, filed.
481	Oct 19	Plffs offer of proof re: witnesses who have not previously testified, filed.
482	Oct 19	Defts pretrial statement re: damages, filed.
483	Oct 23	Defts' reply brief in support of motion for summary judgment and preclusion of proof, filed.
484	Nov 9	Plff's supplemental answers to interrogatories of Kennedy Culvert, first set, filed.
--	Nov 9	Plff's pre-trial statement-supplement 11-9-81, filed.
--	Nov 9	Plff's amended proposed statement of the case, filed.
485	Nov 12	Plff's trial brief, filed.
486	Nov 13	ORDER THAT PLFFS MAY AMEND THE DAMAGE COMPUTATION FILED 9-14-81 WITHOUT CHANGING THE THEORY OR METHODOLOGY, BY 9-21-81, ETC. PLFFS MOTION FOR PROTECTIVE ORDER FILED 9-14-81, IS GRANTED EXCEPT THAT: COURT RESERVES WHETHER DEFTS MAY DEPOSE HOWMET CORP., DEFTS SHALL SPECIFY THE PROPOSED DISCOVERY BY 9-28 & PLFFS SHALL RESPOND BY 10-5-81 EACH PARTY SHALL SUBMIT AN OFFER OF PROOF BY 10-19-81 AND THE

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		PARTIES MAY TAKE TELEPHONE DEPOSITIONS OF THESE WITNESSES PRIOR TO TRIAL: FINAL PRE-TRIAL CONFERENCE SAHLL BE HELD ON 11-12-81, ETC. TRIAL SHALL START 11-16-81, FILED. 11-13-81 Entered and Copies mailed.
487	Nov 13	Plff's Points for charge-damages, filed.
488	Nov 16	Jury Trial, jurors selected and sworn, filed.
489	Nov 18	Jury Trial, resumes, witnesses sworn, filed.
490	Nov 20	Jury Trial of 11-18-81, resumes, witnesses sworn, filed.
491	Nov 20	Jury Trial of 11-19-81, resumes, witnesses sworn, filed.
492	Nov 23	Jury Trial of 11-20-81, resumes, witnesses sworn, filed.
493	Nov 24	ORDER THAT PLFF'S MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER OF 6-18-81 GRANTING A RETRIAL AS TO DAMAGES ONLY IS DENIED. PLFF'S MOTION FOR A PROTECTIVE ORDER IS DENIES AS MOOT. PLFF'S MOTION TO ADD ONE WITNESS TO PLFF'S WITNESS LIST IS GRANTED. DEFT'S MOTION FOR SUMMARY JUDGMENT AND FOR PRECLUSION OF PROOF OF DAMAGES IS DENIED. ETC. FILED. 11-24-81 Entered and Copies mailed.
494	Nov 25	Jury trial 11/23/81 resumes, witnesses sworn, filed.
495	Nov 30	Jury Trial of 11-24-81 resumes, witnesses sworn, filed.
496	Nov 30	Transcript of testimony of 11-17-81, filed.
497	Nov 30	Transcript of testimony of 11-18-81, filed.

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498	Nov 30	Transcript of testimony of 11-19-81, filed.
499	Nov 30	Transcript of testimony of 11-20-81, filed.
500	Nov 30	Transcript of testimony of 11-23-81, filed.
501	Nov 30	Transcript of testimony of 11-24-81, filed.
502	Dec. 1	Plff's memorandum of law, filed.
503	Dec. 1	Kaiser's memorandum regarding proposed rebuttal testimony by Dr. Spero, filed.
504	Dec. 2	ORDER THAT COFFEE BE FURNISHED 8 JURORS ENGAGED IN THE ABOVE ENTITLE CASE, FILED.
505	Dec. 2	ORDER THAT THE UNITED STATE MARSHAL BE AND HE IS HEREBY DIRECTED TO FURNISH LUNCH FOR 8 JURORS AND 1 DEPUTY UNITED STATES MARSHAL ENGAGED IN THE ABOVE ENTITLED CASE, FILED.
506	Dec. 2	Civil Jury Trial of 11-25-81 resumes, witnesses sworn, filed.
507	Dec. 2	Civil Jury Trial of 11-30-81 resumes, witnesses sworn, filed.
508	Dec. 2	Civil Jury Trial of 12-1-81 resumes, filed.
509	Dec. 2	Deposition of Lurier J. Fotrier, Jr., filed.
510	Dec. 2	Transcript of Hearing of 12-29-80, filed.
511	Dec. 2	Transcript of Hearing of 11-30-81, filed.
512	Dec. 2	Transcript of Hearing of 11-25-81, filed.
513	Dec. 2	Transcript of Hearing of 11-25-81, filed.
514	Dec. 2	Civil Jury Trial of 12-2-81, resumes, Verdict recorded, Judgment to be entered. filed.
515	Dec. 2	Interrogatories to the Jury, filed.
516	Dec. 2	ORDER POST-TRIAL MOTIONS, ARE TO BE SERVED AND FILED WITHIN 10 DAYS, ETC. ORAL ARGUMENT WILL BE HELD ON 1-29-82 AT 9:00 A.M., ETC. FILED.
		12-3-81 Entered and Copies mailed.

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517	Dec. 2	ORDER THAT COFFEE BE FURNISHED 8 JURORS ENGAGED IN THE ABOVE ENTITLED CASE, FILED.
518	Dec. 4	ORDER THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF JOSEPH A. BONJORNO, GEORGE M. KERR, JR. & BARBARA K. CLISBY, AS TRANSFERREES IN LIQUIDATION AND DISSOLUTION OF COLUMBIA METAL CULVERT CO., INC. AND AGAINST KAISER ALUMINUM AND CHEM. CORP. & KAISER ALUMINUM & CHEM. SALES, INC. IN THE SUM OF $9,567,939.00 FILED.
		12-4-81 Entered and Copies mailed.
519	Dec. 10	Plff's pre-trial Statement-Supplement 11-9-81, filed.
520	Dec. 10	Plff's amended proposed statement of the case, filed.
521	Dec. 14	Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. MOTION FOR JUDGMENT N.O.V. CERTIFICATE. FILED.
522	Dec. 14	KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC. MOTION FOR A NEW TRIAL, CERTIFICATE. FILED.
523	Dec. 14	DEFT'S MOTION TO STAY EXECUTION OF THE JUDGMENT, MEMO, CERTIFICATE. FILED.
524	Dec. 28	ORDER THAT KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC. SHALL HAVE AN EXTENSION OF TIME

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		TO SERVE AND FILE A MEMORANDUM OF LAW IN SUPPORT OF THEIR POST-TRIAL MOTION UNTIL DECEMBER 31, 1981, FILED.
		12-28-81 Entered and Copies mailed.
525	Dec. 31	Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. Brief in Suppor of Motion for Judgment N.O.V. and For a New Trial, filed.
526	Dec. 31	PLFFS MOTION FOR ATTORNEY'S FEES AND COSTS, BRIEF, FILED.
1982		
527	Jan. 5	Defts brief in Support of Motions for Judgment N.O.V. or for a New Trial Errata Sheet, filed.
528	Jan. 8	Plffs' Brief in Opposition to Defts Motions for Judgment N.O.V. for a New Trial-Damages Trial, certificate, filed.
529	Jan. 29	Transcript of Jury Trial of December 1, 1981, filed.
530	Jan. 29	Transcript of Jury Trial of December 2, 1981, filed.
531	Feb. 3	ORDER THAT COUNSEL FOR PLFFS SHALL FILE, ON OR BEFORE 2-26-82 SUPPLEMENTAL DOCUMENTS SUPPORTING THE MOTION FOR ATTORNEY'S FEES AND COSTS FILED 12-31-81: ETC. FILED.
		2-3-82 Entered and Copies mailed.
532	Feb. 25	PLFF'S REVISED MOTION FOR ATTORNEY'S FEES AND COSTS, CERTIFICATE, NOTICE, BRIEF, FILED.
533	Mar. 15	PLFF'S MOTION FOR POSTING OF SECURITY TO STAY EXECUTION OF

Date		Proceedings
1982		
		JUDGMENT, NOTICE, MEMO, CERTIFICATE, FILED.
534	Mar. 19	Defts' Kaiser's answer to motion for posting of security to stay execution of judgment, memo. of law, in support of motion to stay execution, filed.
535	Mar. 29	Defts' Memorandum in Opposition to Plffs' Revised Motion for Attorney's Fees and Costs, Certificate of Service, filed.
536	Mar. 29	Richard P. McElroy's Affidavit in Opposition to Plffs' Application for Award of Attorney's Fees, filed.
537	Apr. 8	Letter to the Honorable Norma L. Shapiro from Michael M. Baylson, Esq. re: Necessity for an Evidentiary Hearing, filed.
538	June 9	ORDER THAT ON OR BEFORE JUNE 19, 1982 THE PARTIES MAY FILE BRIEFS DISCUSSING RELEVANT DEVELOPMENTS IN THE LAW SINCE THE LAST ORAL ARGUMENT. ORAL ARGUMENT ON THESE BRIEFS WILL BE HELD ON JUNE 24, 1982, ETC. FILED.
		6/9/82 Entered and Copies mailed.
539	June 18	Defts' Supplemental Memorandum in Support of Motion for Judgment N.O.V. and for A New Trial, Certificate of Service, filed.
540	June 21	Plff's Supplemental Memo. in Opposition to Defts' Post-Trial Motions, filed.
541	June 24	Argued Sur: Hearing of 6/24/82 on Supplemental Post-Trial Memoranda, filed.
542	Dec. 10	PLFF'S. MOTION TO DISPOSE DEFT'S. POST-TRIAL MOTIONS WITHOUT FULL OPINION, MEMO, CERTIFICATE, NOTICE, FILED.

Date		Proceedings
1983		
543	Jan. 17	MEMORANDUM AND ORDER GRANTING DEFT'S MOTION FOR JUDGMENT N.O.V. WITH RESPECT TO JURY AWARD OF $1,638,793.00 IN RESPONSE TO INTERROGATORY #4 AND OTHERWISE DENIED. ALTERNATIVE MOTION FOR NEW TRIAL IS DENIED; JUDGMENT WILL BE ENTERED ON VERDICT OF JURY FOR $4,651,560.00, FILED. 1/18/82 Entered & Copies mailed.
544	Jan. 18	ORDER THAT PLFFS. RECOVER OF KASIER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC. THE AMOUNT OF $4,651,560.00 WITH INTEREST AND COSTS, FILED. 1/18/83 Entered & Copies mailed.
545-46	Jan. 18	Transcripts of testimony, filed (2 vols.).
547	Jan. 19	Plff's notice of appeal, filed. (83-1079) 1/20/83 copies to: U.S.C.A., Morris L. Weisberg, Esq.
548	Jan. 19	Copy of Clerk's notice to U.S.C.A., filed.
549	Jan. 24	Certified copy of order U.S.C.A. that petition for writ of mandamus is denied, filed.
550	Jan. 27	Deft's notice of appeal, filed. 1/28/83 copies to: U.S.C.A., Michael M. Baylson, Esq.
551	Jan. 27	Copy of Clerk's notice to U.S.C.A., filed.
552	Jan. 27	DEFT'S MOTION REQUESTING A BOND FOR COSTS ON APPEAL, MEMO, CERTIFICATE, FILED.
553	Jan. 27	DEFT'S MOTION FOR APPROVAL OF SUPERSEDEAS BOND, CERTIFICATE, FILED.

Date		Proceedings
1983		
(553)	Jan. 31	ORDER DATED 1-28-83 THAT EXECUTION TO ENFORCE JUDGMENT OF 1-18-83 BE STAYED; SUPERSEDEAS BOND IN THE AMCUNT OF $4,651,560.00 IS APPROVED, FILED. 2/1/83 Entered & Copies mailed.
--	Jan. 31	Supersedeas bond in the sum of $4,651,560.00 with Insurance Co. of North America as surety, filed. 2/1/83 Entered & Copies mailed.
554	FEB. 3	Copy of Transcript Purchase Order, filed.
--	FEB. 3	RECORD COMPLETE FOR PURPOSES OF APPEAL.
555	FEB. 3	Copy of Appellant's transcript purchase order, filed.
556	FEB. 17	Plff's response to motions concerning bond on appeal, filed.
557	FEB. 18	Certificate of Service by Michael M. Baylson re: served copy of plff's response to motions concerning bond on appeal to Richard P. McElroy, Esq. on 2-17-83, filed.
558	Mar. 15	Receipts re: return of exhibits 2001, filed.
559	Mar. 15	Plff's supplemental points for charges as to damages, filed.
560	Mar. 16	MEMORANDUM & ORDER THAT PLFFS. SHALL FILE A BOND OR OTHER SECURITY IN THE AMOUNT OF $2,500.00 WITHIN 30 DAYS; DEFTS. SHALL INCREASE THE SUPERSEDEAS BOND PREVIOUSLY APPROVED BY THE COURT IN THE AMOUNT OF $2,500.00 WITHIN 30 DAYS, FILED. 3/17/83 Entered & Copies mailed.
561	Mar. 25	Transcripts of telephone conference 1-28-83, filed.

	Date	Proceedings
	1983	
562	Mar. 28	PLFF'S MOTION FOR RECONSIDERATION OF ORDER DATED 3-16-83, MEMO, CERTIFICATE, FILED.
563	Apr. 18	Receipt re: return of exhibits D-1325-D1387 (Vol. 12), filed.
564	Apr. 19	ORDER THAT THE COURT'S ORDER OF 3-16-83 IS STAYED PENDING DECISION ON PLFF'S MOTION FOR RECONSIDERATION, FILED. 4/20/83 Entered & Copies mailed.
565	Apr. 22	Letter dated 4-22-83 by Alexander D. Bono re: return of Exhibits D-1325 - 1387, volume 12, filed.
566	Apr. 28	ORDER THAT PLFFS' MOTION FOR RECONSIDERATION IS DENIED, FILED 4/28/83 entered & copies mailed
--	May 6	Plff's bond for costs on appeal in the sum of $250,000.00 with the Fidelity and Deposit Co. of Maryland, as surety, filed.
567.	May 12	MOTION OF DEFTS, KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC., FOR RELEASE OF SUPERSEADEAS BOND APPROVED BY ORDER ENTERED 3/17/83; & ORDER DD. 5/12/83 INSTRUCTING THE CLERK OF THE DISTRICT COURT TO RELEASE TO R. P. McELROY, ESQ. OR A. D. BONO, ESQ. (DEFTS' COUNSEL) THE SUPERSEDEAS BOND IN THE AMOUNT OF $4,651,560.00, WHICH IS FOUND IN THE RECORD AT DOCKET NO. 553, ETC., FILED. (5/13/83 entered & copies mailed.) (NS)

	Date	Proceedings
	1983	
-	May 12	BOND RETURNED TO DEFTS' COUNSEL on 5/12/83.
--	May 12	Deft Supersedeas Bond in the sum of $4,654,060.00, with Insurance Company of North America as surety, filed. 5/13/83 entered & copies mailed. (NS)
568	July 5	PLFF'S SUPPLEMENTAL MOTION FOR ATTYS. FEES AND COSTS AND FOR RELATED DISCOVERY, MEMO, CERTIFICATE, FILED.
569	July 11	Deft's memorandum in opposition to plff's supplemental motion for atty's. fees and costs and for related discovery, filed.
	1985	
570	Jan. 16	PLFFS' MOTION FOR ORDER INCREASING BOND, MEMO, CERT OF SERVICE, FILED.
571	Jan. 17	PLFFS' AMENDED MOTION FOR ORDER INCREASING BOND, MEMO, CERT OF SERVICE, FILED.
572	Feb. 1	Defts' response opposing amended motion for order increasing bond, memo, cert of service, filed.
573	Feb. 1	Plffs' reply brief in support of amended motion for order increasing bond, filed.
574	Feb. 20	MEMORANDUM & ORDER THAT PLFFS' MOTION TO INCREASE THE AMOUNT OF A SUPERSEDEAS BOND IS DENIED, FILED. 2-20-85 Entered & copies mailed.
	1986	
575	JUL 02	Certified copy of Judgment (USCA) that the order of said District Court ente ed 1/18/83

Date		Proceedings
1986		
		which granted in party the deft's Motion for a judgment n.o.v. is granted. It is further ordered that judgment of said District Court entered 1/18/83 is vacated & the cause remanded to said District Court which is directed to reinstate the judgment entered 12/4/81 which is affirmed. Costs taxed in favor of appellants & crossappellees, briefs & appendix $3,120.00, filed.
576	JUL 03	PLFF'S MOTION FOR AWARD OF INTEREST, MEMO, CERT OF SERVICE, FILED.
577	JUL 07	ORDER THAT CONF. SCHEDULED FOR 8/6/86, 9:30AM, J. SHAPIRO'S CHAMBERS, FILED.
		7/8/86 entered & copies mailed.
578	AUG 07	ORDER THAT PLFFS SHALL SUBMIT ANY FACTUAL MATERIALS AND/OR BRIEF ON ISSUE OF INTEREST BY 10/15/86. DEFTS RESPONSE WITHIN 30 DAYS & PLFFS REPLY BRIEF WITHIN 10 DAYS THEREAFTER, WHETHER A HEARING WILL BE HELD IS RESERVED, FILED.
		8/7/86 entered & copies mailed.
579	AUG 07	ORDER THAT THE PARTIES SHALL REPORT ON STATUS OF FEE SETTLEMENT NEGOTIATIONS BY 9/30/86, IF FEE ISSUE HAS NOT BEE SETTLED, BRIEFS DUE, PLFFS 10/31/86, DEFTS 11/28/86, EVIDENTIARY HEARING & ORAL ARGUMENT 12/23/86, 9:30AM, CTRM 10-A, FILED.
		8/7/86 entered & copies mailed.
580	SEP 16	Transcript of 8/6/86, filed.

Date		Proceedings
1986		
581	OCT 10	ORDER THAT COUNSEL SHALL ATTEND A SETTLEMENT CONFERENCE ON 11/12/86, ETC., FILED.
		10/10/86 entered & copies mailed
582	OCT 10	STIPULATION AND ORDER THAT PLFFS MAY HAVE AN EXTENSION OF ONE WEEK TO 10/22/86 TO SUBMIT THEIR PAPERS ON ALL ISSUES OF POSTJUDGMENT INTEREST AND THAT DEFTS' BRIEF SHALL BE DUE 30 DAYS THEREAFTER, FILED.
		10/14/86 entered and copies mailed.
583	OCT 20	Letter to Clerk from Richard P. McElroy, Esq. dtd 10/17/86 re: Morris L. Weisberg, Esq. has been withdrawn as counsel & Richard P. McElroy, Esq. appointed counsel, for deft., filed.
584	OCT 29	Plffs' Brief in Support of their Claim for Interest on Judgment under 28 USC §1961, cert of service, filed.
585	NOV 12	Defts' Objections to Plffs' Post Judgment Interrogatories & Request for Production of Documents, cert of service, filed.
586	NOV 19	STIPULATION & ORDER EXTENDING TIME UNTIL 12/17/86 IN WHICH DEFT. KAISER ALUMINUM & CHEMICAL CORP. HAS TO FILE ITS BRIEF ON THE ISSUE OF POST JUDGMENT INTEREST, FILED.
		11/20/86 entered & copies mailed.
587	NOV 21	ORDER THAT A HEARING ON THE ISSUE OF POST JUDGMENT INTEREST WILL BE HELD ON 12/23/86, ETC. A HEARING ON THE ISSUE OF COUNSEL FEES WILL BE HELD BEGINNING

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1986		
		2/9/ ETC. FILED.
		11/21/86 Entered and Copies mailed.
588	NOV 26	Plff's Brief in Support of Application for Atty's Fee, cert of service, filed.
589	DEC 03	Defts Brief in Opposition to Plffs' Claim for interest on the judgment under 28 USC §1961, cert of service, filed.
590	DEC 08	Defts Robert A. Kennedy & Kennedy Culvert & Supply Co.'s Dissolution of Attachment, filed.
591	DEC 08	Defts Robert A. Kennedy & Kennedy Culvert & Supply Co.'s Praecipe to Mark Judgment Satisfied of the judgment of 12/26/79 for costs in favor of defts & against plff Columbia Metal Culvert Co., Inc., filed.
592	DEC 18	Plff's Reply Brief in Support of their Claim for Interest, cert of service, filed.
593	DEC 24	ORDER THAT EVIDENTIARY HEARING ON AWARD OF POST JUDGMENT INTEREST SCHEDULED FOR 1/7/87, 4:00PM, FILED.
		12/26/86 entered & copies mailed.
1987		
594	JAN 06	Defts' Submission in Opposition to Application of the United States Rule, cert of service, filed.
595	JAN 9	Hearing 1/7/87 re: award interest, witness sworn, filed.
596	JAN 09	STIPULATION & ORDER EXTENDING TIME UNTIL 1/20/87 IN WHICH DEFT HAS TO FILE BRIEF IN OPPOSITION TO PLFFS APPLICATION FOR ATTYS FEES, FILED.
		1/12/87 entered & copies mailed.

Date		Proceedings
1987		
597	JAN 12	Transcript of 12/23/86, filed. (ER)
598	JAN 20	PLFFS MOTION TO DEFER RULING ON PLFFS RIGHT TO ALLOCATE FUNDS RECD BETWEEN PRINCIPAL & INCOME, CERT OF SERVICE, FILED.
599	JAN 23	Transcript of 1/7/87, filed.
600	JAN 28	Defts' Preliminary Brief in Opposition to Plffs Application for Atty's Fee, cert of service, filed.
601	FEB 05	ORDER THAT BRIEFS SHALL BE FILED AS FOLLOWS: PLFFS' 11/26/86; DEFTS' PRELIMINARY, 1/28/87; DEFTS' FINAL, 2/16/87; PLFFS' REPLY, 3/2/87, ETC., FILED.
		2/6/87: Entered and copies mailed.
602	FEB 17	Defts' brief in opposition to Plffs' application for attorneys fees, certificate, filed.
603	FEB 17	Appendix to Defts' memo in opposition to plffs' application for the award of Attorneys' fees, filed.
604	MAR 9	PLFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES, CERTIFICATION OF COUNSEL, CERTIFICATE OF SERVICE, BRIEF, FILED.
605	MAR 9	Reply brief of plff & Duane, Morris & Heckscher in support of application for attorney's fee, certificate of service, affidavits, filed.
606	MAR 23	Deft's brief in opposition to motion to compel, cert. of service, fiied.
607	MAY 04	STIPULATION & ORDER THAT FOR THE PURPOSES OF RELEASING THE SUPERCEDEAS BOND CURRENTLY MAINTAINED BY DEFTS KAISER ALUMINUM & CHEMICAL CORP. & KAISER ALUMINUM & CHEMICAL SALES, INC.

Date		Proceedings
1987		
		ALL PARTIES AGREE THAT A BOND IS NO LONGER REQUIRED AS PRINCIPAL JUDGMENT HAS BEEN PAID. THIS STIPULATION IS ENTERED INTO WITHOUT PREJUDICE TO PLFFS' CLAIM FOR INTEREST & ATTYS FEES, FILED.
		5/5/87 entered & copies mailed.
608	AUG 13	Plffs' Supplemental Brief in Support of Attys' Fees & Costs, cert of service, filed.
609	AUG 13	Affidavit of Regan R. Rockhill, cert of service, filed.
610	OCT 01	Defts' Supplemental Brief re: Impropriety of a Contingency Enhancement to Award of Atts Fees, cert of service, filed.
1988		
611	FEB 29	ORDER THAT A CONFERENCE IS SCHEDULED FOR 4/11/88, 4:30PM, FILED.
		3/1/88 entered & copies mailed.
612	APR 11	ORDER THAT PLFFS MOTION TO COMPEL ANSWERS TO INTERR. 3 & 6, FIRST SET & DEFTS ANSWER IN OPPOSITION, MOTION – DENIED, ETC., FILED.
		4/12/88 entered & copies mailed.
613	APR 12	MEMORANDUM & ORDER THAT PLFFS MOTION TO AWARD POST-JUDGMENT INTEREST – GRANTED, DEFTS SHALL PAY PLFFS POST-JUDGMENT INTEREST IN AMOUNT OF $2,632,886.30 CALCULATED AS FOLLOWS: INTEREST PERIOD (12/2/81 TO 7/3/86) = 4 yrs, 214 DAYS

Date		Proceedings
1988		
		INTEREST OWED = ($9,567,939) x (6%) x (4 + (214/365)) = $2,632,886.30, FILED.
		4/12/88 entered & copies mailed.
614	APR 13	Plff's Notice of Appeal, filed. (USCA 88-1318)
		4/14/88 copies to F. Poul, R. McElroy, J. Shapiro, D. Spitz, Clerk, USCA.
615	APR 13	Copy of Clerk's Notice, filed.
616	APR 20	ORDER THAT A HEARING IS SCHEDULED FOR 6/1, 6/2 & 6/3/88, 10:AM, CTRM 10-A, FILED.
		4/21/88 entered & copies mailed.
617	APR 29	Appellant's TPO form, filed.
--	MAY 3	RECORD COMPLETE FOR PURPOSES OF APPEAL-TRANSCRIPT ALREADY ON FILE.
618	MAY 11	Kaiser Aluminum & Chemical Corp. & Kaiser Aluminum & Chemical Sales, Inc's cross notice of appeal, filed. (USCA 88-1396)
		5-12-88 Entered & copies to: USCA, D. Spitz, Judge Shapiro, M. Baylson, F. Poul.
619	MAY 11	Copy of Clerk's Notice, filed.
620	MAY 16	ORDER THAT ORAL ARGUMENT SCHEDULED FOR 6/1/88 IS CANCELLED, FILED.
		5/16/88 entered & copies mailed.
621	MAY 16	MOTION OF DEFTS TO STAY EXECUTION ON 4/11/88 ORDER FIXING THE AMOUNT OF POST JUSGMENT INTEREST, MEMO, CERT OF SERVICE, FILED.
622	MAY 18	Memorandum of Plffs in Opposition to Defts Motion for Stay of Execution of Interest Award, cert of service, filed.

Date		Proceedings
1988		
623	MAY 19	Reply Memorandum of defts in support of Motion to Stay Execution on 4/11/88 Order Fixing amount of post judgment interest, cert of service, filed.
(621)	MAY 20	ORDER THAT DEFTS MOTION – GRANTED, EXECUTION IS STAYED WITHOUT BOND, FILED. 5/20/88 entered & copies mailed.
624	MAY 24	Appellant's TPO form, filed.
625	JUN 24	ORDER THAT THE HEARING ON THIS CASE SCHEDULED FOR 7/5/88, 7/6/88 AND 7/7/88 IS CANCELLED, FILED. 6/27/88 entered & copies mailed.
626	OCT 13	Letter recd from Elizabeth A. Welch for receipt of plff's exhibits, filed.
627	OCT 13	Order that in accordance with LR 39 of this court, the following exhibits have been deemed abandoned & destroyed, deft's exhibits, filed.
1989		
628	MAR 21	ORDER THAT ON DISPOSITION OF THE PETITION FOR REHEARING PLFFS MAY SUPPLEMENT THE FEE PETITION WITH ANY CLAIM FOR ATTORNEY'S FEES ON APPEAL WITHIN 60 DAYS: ETC: DEFTS MAY RESPOND WITH REGARD TO ITEMS CONTESTED AS TO NATURE OR AMOUNT (TIME EXPENDED OR RATE CHARGED): AN EVIDENTIARY HEARING WILL BE HELD BEGINNING ON JUNE 19, 1989 at 9:00AM, FILED. 3/21/89 entered & copies mailed.
629	MAY 18	PLFFS' MOTION FOR SUBSTITUTION

Date		Proceedings
1989		
		OF PARTY BY REASON OF DEATH, MEMO, CERTIFICATE, FILED.
630	MAY 19	Affidavit of Edward G. Biester, III regarding supplemental request for fees and costs through April 30, 1989, filed.
631	MAY 19	Affidavit of William G. Frey regarding supplemental request for fees and costs through April 30, 1989, filed.
(629)	JUN 07	ORDER THAT LORRAINE KERR'S MOTION IS GRANTED, & THAT THIS ACTION SHALL PROCEED WITH LORRAINE KERR, EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR, SUBSTITUTED AS A PARTY PLFF IN THE PLACE OF GEORGE M. KERR, JR, FILED. 6/7/89 entered & copies mailed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET NO. 83-1047

Date	*Proceedings*
1983	
Jan. 21	Motion by applts. to expedite appeal, in which it states applts. can file B&A within 20 days from 1/21/83 (2-10-83), and propose that appees. brief be filed at 20 day intervals & oral argmt. be scheduled as promptly as possible, w/svc., filed.
Jan. 21	Motion by applts. to file a separate appdx., w/svc., filed.
Jan. 27	Memorandum by appee. Kaiser Aluminum in response to mot. to expedite appeal, w/svc., filed.
Jan. 27	Reply by appees. Kaiser Aluminum, to applts' mot. to file a sep. appdx., w/svc., filed.
Jan. 28	Submitted on applts' mot. to expedite appeal, and mot. to file sep. appdx. Coram: Gibbons, Hunter & Rosenn, C.J.
Feb. 2	Letter dated 2/1/83 from C. Charles Hodgson, Jr., Esq., adv. his client Robert Kennedy & Kennedy Culvert will be involved in this appeal and accordingly no appearance will be entered. Send to Merits Panel.
Feb. 8	Order (*Gibbons,* Hunter & Rosenn, C.J.) denying applts' mot. to expedite appeal; denying applts' mot. to file a sep. appdx., and stating Judge Hunter would grant the mot. to expedite the appeal, filed.
Mar. 21	Motion by appees-cross-applts., Kaiser Aluminum etc., et al. to file a B. in excess of 50 pgs. to 75 pgs., w/svc., filed. (Cov. 83-1047 & 83-1079)
Mar. 22	Response by applts. to mot. of appees-cross-applts., Kaiser to file B. in excess pagn., w/svc., filed. (Cov. 83-1047 & 83-1079)
Mar. 28	Order (Clerk) denying above mot. as presented; granting permission to file a brief not to exceed 60 pgs., filed. (Cov. 83-1047 & 83-1079)

Date	*Proceedings*
1983	
Apr. 15	Motion consent, for leave to file one additional volume of appendix, (Vol. 13), w/serv., filed.
Apr. 26	Order (Clerk) grant above motion, filed.
May 24	Consent Motion by aplts for enlargement of the number of pages in their second brief, w/serv, filed.
May 31	Order (Acting Clerk) denying above mot. as presented; directing cnsl may file a brief in excess of pgs. of ten (10), filed.
May 26	Ltr dated 5/25/83 from Michael M. Baylson, cnsl for applt., stating that cnsl for both sides request this matter not be listed for disposition between Aug 8-19 and Aug. 29-Sept. 9, etc. Send to merits
June 1	Mot. by applts-cross-applees for leave for leave to file one addl. vol. of appendix (Vol. 14), w/consent, w/serv., filed. (cvs. 83-1047 & 1079)
June 3	Order (Clerk) granting above mot. with filing as of the date of this order, filed. (Cvs. 83-1047 & 1079)
June 16	Mot. by applts-cross-applees to advance case on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 16	Memorandum of applees-cross-applts in opposition to mot. to advance cases on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 20	Order (Clerk) denying applts-cross-applees' mot. to advance cases on Court's calendar, filed. (Cvs. 83-1047 & 1079)
June 24	Ltr dated 6/24/83 from Michael M. Baylson, Esq., cnsl for applt. pursuant to Rule 28 (j), F.R.A.P., recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
June 24	Ltr dated 6/24/83 from cnsl for applt. requesting that cases be listed on Wednesday, 9/14/83 or Thursday, 9/15/83. (Cvs. 83-1047 & 1079)
June 29	Ltr dated 6/29/83 from Richard P. McElroy, Esq., cnsel for applees. pursuant to Rule 28(j), F.R.A.P.,

Date	*Proceedings*
1983	
	recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
Nov. 14	Ltr dtd 11/11/83 from Michael M. Baylson, Esq, cnsel for applts in 83-1047, recd for the Court's info. (Cvs. 83-1047 and 83-1079)
Nov. 17	Copy of 11th Cir's opinion in *Graphic Products Distributors, Inc. v. Itek Corp.*, recd from Michael M. Baylson, Esq., for the Court's info. (Cvs. 83-1047 & 1079)
Dec. 16	Clk's ltr to cnsel, written at the direction of the Crt, directing cnsel to reply to the question of what effect, if any, a holding that a corp. cannot conspire with its wholly-owned subsidiary would have on the issues in the case of *Copperweld Corp. v. Independence Tube Co.*, No. 82-1210, orig & 3cc's shld be recd by the Clk on or before 12/22/83. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Court. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Michael M. Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., appendix to ltr, recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
Dec. 28	Clerk's letter to counsel, written at the direction of the Ct., advising the Court has decided to await the S.C. opinion in *Copperweld Corp. v. Independence Tube Co.* (Cvs. 83-1047 & 83-1079)
1984	
June 21	Ltr. dtd 6/21/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., w/encl., recd for the Crt's info. (Cvs. 83-1047 & 1079)
June 21	Ltr dtd 6/21/84 from Michael M. Baylson, Esq,

Date	*Proceedings*
1984	
	requesting the opportunity to submit a ltr to the Crt giving addl reasons why the *Copperweld* decision does not effect the present case *and* to submit reasons why *Copperweld* shld be held not retroactive to this case, *and* for permission to submit these ltrs by 6/29/84. (Cvs. 83-1047 and 84-1079)
June 25	Clk's ltr to cnsel, written at the direction of the Crt, requesting cnsel to comment by ltr on the effect of the S.C. decision in *Copperweld Corp. v. Independence Tube Corp.*, decided 6/19/84, 52 Law Week 4821, on the issues presented in the above matter; orig & 3cc's of ltrs shld be recd by Clk's ofc on or before 7/10/84. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Michael Baylson, Esq, cnsel for Bonjorno, et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 12	Ltr dtd 7/12/84 from Henry T. Reath, Esq, cnsel for Bonjorno, et al., correcting and supplementing a matter contained in his ltr of 7/10/84. (Cvs. 83-1047 & 1079)
Oct. 1	Ltr dtd 10/1/84 from Michael Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cvs. 83-1047 & 1079)
Nov. 6	Ltr dtd 11/6/84 from Richard P. McElroy, Esq, cnsel for applees, Kaiser Aluminum & Chemical Corp., et al., w/encls., recd for the Crt's info. (Cvs 83-1047 & 1079)
Nov. 8	Ltr dtd 11/7/84 from Michael M. Baylson, Esq, cnsel for Bonjorno, et al., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cv. 83-1047 & 1079) (dt)

Date	*Proceedings*
1985	
Jan. 3	Motion of Appellees, Cross-Appellants, Kaiser Aluminum & Chemical, et al, for a thirty day extension of time within which to file pet. for rehg, filed. w/serv. (ch) Covers 83-1047 and 83-1079
Jan. 10	Order (Seitz, C.J.) granting mot. of appee/crs. aplts, for a thirty day ext. of time in which to file pet. for rehg. to and including Feb. 11, 1985, filed. (ml) (Cvs. 83-1047 & 83-1079)
1984	
Dec. 27	The order of the D.C. entered 1-18-83 which granted in part defendant's motion for a judgment n.o.v. is reversed. The judgment of the D.C. is vacated and the cause remanded to D.C. which is directed to reinstate the judgment entered 12-4-81, which is affirmed. Costs taxed in favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court, filed. (ml) (Cvs. 83-1047 & 83-1079)
1985	
Jan. 17	Motion of Appellees, Cross-appellants, Kaiser Aluminum, et al., for leave to increase the maximum number of pages in their pet. for rehg. to 30 pps. filed. (Cvs. 83-1047 & 83-1079) (ml)
Jan. 22	Order (Seitz, C.J.) granting apees, crs-aplts leave to increase max. number of pages in pet. for rehg. to thirty pages, filed. (ml) (Cvs. 83-1047 & 83-1079)
Feb. 14	Motion of appellant for leave to file bill of costs out of time, w/serv., filed. (ml) (Cvs. 83-1047 & 83-1079)
Feb. 26	Order (Clerk) granting appellant's motion for leave to file bill of costs out of time, filed. (ml) (Cvs. 83-1047 & 83-1079)
March 8	Order (Aldisert, Ch.J., *Seitz,* Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker & Rosenn, C.Js.) denying the petition for

Date	*Proceedings*
1985	
	rehearing in banc. Judge Becker would grant rehearing limited to the price-squeeze issue, together with separate statement sur denial of petition for rehearing by Judge Adams. (Cvs. 83-1047 & 83-1079) (ml)
March 13	Motion of apee/crs-aplt., Kaiser Aluminum, et al. for an order staying issuance of mandate, w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
March 15	Response of appellants/cross-apees. Bonjorno, et al. to apees/crs.aplts. motion for an order staying issuance of mandate, filed. (Cvs. 83-1047 & 83-1079) (ml)
March 27	Order (Seitz, C.J.) staying issuance of mandate to and including June 6, 1985, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 1	Motion of appellants/cross-appellees, Bonjorno, et al., for posting of security by appellees/ cross-appellants, Kaiser Aluminum & Chemical Corporation, et al., w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
April 8	Response of appees/crs.aplts. Kaiser Aluminum, et al. in opposition to motion of aplts/crs.apees for posting security, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 12	Clerk's letter to counsel written at the direction of the Court requesting counsel to comment on the applicability of Rule 44.2 of the Rules of the S.C. of the U.S.A., to this matter. Responses due on or before 4-17-85. (Cvs. 83-1047 & 1079) (ml)
April 17	Letter dated 4-17-85, from Joseph A. Fillip, Jr., Esq., cnsl for Bonjorno, et al., in response to Court's request of 4-12-85, filed. (83-1043 & 1079)
April 17	Letter dated 4-17-85, from Alexander D. Bono, Esq., cnsl for Kaiser, et al. in response to Court's request of 4-12-85, filed. (Cvs. 83-1047 & 1079) (ml)
April 26	Order (SEITZ, CJ) which reads as follows: "The foregoing motion and the response having been considered along with the supplemental briefing and

Date	*Proceedings*
1985	
	being of the view that I may exercise discretion and that appellees-cross appellants have shown good cause under the present circumstances for not requiring additional security, it is Ordered that the motion is denied", filed. (1043 & 1079) (ch)
1986	
June 24	~~Motion by Plaintiffs-Appellants-Cross-Appellees' pursuant to FRAP 37 for inclusion in mandate of instructions regarding interest filed (Covers 83-1047 & 83-1079) (bjr)~~ WITHDRAWN 6/30/86
June 26	Ltr. date 6/26/86 rec'd from Michael M. Baylson, Esquire.
June 30	Stipulation by the cnsl for the parties as follows: 1. The mandate shall issue to the U.S. D.C. for the Eastern Dist of Penna. immediately and shall state that the D.C. should consider all issues regarding the calculation of interest in this case. 2. Plaintiffs – Aplts – Cross-Appees withdraw, without prejudice, their Motion Pursuant to Fed. R. App. P. 37 for inclusion in Mandate of Insructions regarding Interest. 3. Defendants=Appees-Cross-Aplts. agree that they will not contend that plaintiffs have waived any procedural or substantive claim for interest by this Court not considering the issue of interest Covers. 83-1047 and 83-1079, filed. (bjr)
July 1	Order (*Seitz,* Gibbons and Rosenn, CJs) approving the above stipulation. The mandate shall issue promptly, filed. (Covs. 83-1047 & 83-1079) (bjr)
1988	
April 25	Motion of Applt's cross Aplees to recall & amend the mandate to award postjudgment interest pursuant to F.R.A.P. 37, w/serv.fld., (bj)(cvs.83-1047 & 83-1079) (bj)
April 27	Ltr dtd Apr 27, 1988, frm R.P.McElroy, Esq., rec'd,

Date	*Proceedings*
1988	
	(bj) (cvs. 83-1047/1079)
May 3	Opposition of Defendants-applts-cross-aplees to motion to recall & amend the mandate to award post judgment interest pursuant to FRAP 37, fld., (bj) (cvs. 83-1047/79)
May 5	Applts reply Memo in suupport of Motion to Recall & Amend Mandate, w/service, rec'd for the info of the Court, (bj) (cvs. 83-1047/79) (bj)
May 20	Order (Gibbons, Ch.J., *Seitz* & Rosenn, C.J.'s) denying motion to Plaintiffs-Appellant-Cross-Appellees to Recall & amend Mandate to Award Posjudgment Intrerest, without prejeduce to any direct appeal., fld. (bj) (cvs. 83-1047 & 83-1079) (bj)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET NO. 83-1079

Date	*Proceedings*
1983	
Mar. 21	Motion by appees-cross-applts., Kaiser Aluminum etc., et al. to file a B. in excess of 50 pgs. to 75 pgs., w/svc., filed. (Cov. 83-1047 & 83-1079)
Mar. 28	Order (Clerk) denying above mot. as presented; granting permission to file a brief not to exceed 60 pgs., filed. (Cov. 83-1047 & 83-1079)
Mar. 22	Response by applts. to mot. of appees-cross-applts., Kaiser to file B. in excess pagn., w/svc., filed. (Cov. 83-1047 & 83-1079)
June 16	Mot. by applts-cross-applees to advance cases on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 16	Memorandum of applees-cross-applts in opposition to mot. to advance cases on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 20	Order (Clerk) denying applts-cross-applees' mot. to advance cases on Court's calendar, filed. (Cvs. 83-1047 & 1079)
June 1	Mot. by applts-cross-applees for leave to file one addl. vol. of appendix (Vol. 14), w/consent, w/serv., filed. (Cvs. 83-1047 & 1079)
June 3	Order (Clerk) granting above mot. with filing as of the date of this order, filed. (Cvs. 83-1047 & 1079)
June 24	Ltr dated 6/24/83 from Michael M. Baylson, Esq., cnsl for applt. pursuant to Rule 28(j), F.R.A.P., recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
June 24	Ltr dated 6/24/83 from cnsl for applt. requesting that cases be listed on Wednesday, 9/14/83 or Thursday, 9/15/83. (Cvs. 83-1047 & 1079) Send to Merits
June 29	Ltr dated 6/29/83 from Richard P. McElroy, Esq., cnsel for applees. pursuant to Rule 28(j), F.R.A.P.,

Date	*Proceedings*
1983	
	recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
Nov. 14 –	Ltr dtd 11/11/83 from Michael M. Baylson, Esq, cnsel for applts in 83-1047, recd for the Court's info. (Cvs. 83-1047 & 1079)
Nov. 17	Copy of 11th Cir's opinion in Graphic Products Distributors, Inc. v. Itek Corp recd from Michael M. Baylson, Esq., for the Court's info. (Cvs. 83-1047 & 83-1079)
Dec. 16	Clk's ltr to cnsel, written at the direction of the Crt, directing cnsel to reply to the question of what effect, if any, a holding that a corp. cannot conspire with its wholly-owned subsidiary whould have on the issues in the case of *Copperweld Corp. v. Independence Tube Co.*, No. 82-1210, orig & 3cc's, shld be recd by the Clk on or before 12/22/83. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Michael M. Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., appendix to ltr, recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
Dec. 28	Clerk's letter to counsel, written at the direction of the Court, adv. the Ct. has decided to await the S.C. opinion in *Copperweld Corp. v. Independence Tube Co.* (Cvs. 83-1047 & 83-1079)
1984	
June 21	Ltr dtd 6/21/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., w/encl., recd for the Crt's info. (Cvs. 84-1047 & 79)
June 21	Ltr dtd 6/21/84 from Michael M. Baylson, Esq, requesting the opportunity to submit a ltr to the Crt giving addl reasons why the *Copperweld* decision

Date	Proceedings
1984	
	does not effect the present case *and* to submit reasons why *Copperweld* shld be held not retroactive to this case, *and* for permission to submit these ltrs by 6/29/84. (Cvs. 83-1047 and 83-1079)
June 25	Clk's ltr to cnsel, written at the direction of the Crt, requesting cnsel to comment by ltr on the effect of the S.C. decision in *Copperweld Corp. v. Independence Tube Corp.*, decided 6/19/84, 52 Law Week 4821, on the issues presented in the above matter; orig & 3cc's of ltrs shld be recd by Clk's ofc on or before 7/10/84. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Michael M. Baylson, Esq, cnsel for Bnonjorno, et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 12	Ltr dtd 7/12/84 from Henry T. Reath, Esq, cnsel for Bnonjorno, et al., correcting and supplementing a matter contained in his ltr of 7/10/84. (Cvs. 83-1047 & 1079)
Oct. 1	Ltr dtd 10/1/84 from Michael M. Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cvs. 83-1047 & 1079)
Nov. 6	Ltr dtd 11/6/84 from Richard P. McElroy, Esq, cnsel for applees, Kaiser Aluminum & Chemical Corp., et al., w/encls., recd for the Crt's info. (Cvs. 83-1047 & 1079)
Nov. 8	Ltr dtd 11/7/84 from Michael M. Baylson, Esq, cnsel for Bonjorno, et al., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cv. 83-1047 & 1079) (dt)
1985	
Jan. 3.	Motion of Appellees, Cross-Appelants, Kaiser Aluminum & Chemical Corp., et al, for a thirty day

Date	Proceedings
1985	
	extension of time within which to file pet. for rehg, filed. w/serv. Cvs. 83-1047 & 83-1079 (ch)
Jan. 10	Order (Seitz, C.J.) granting mot. of appe/crs. aplts, for a thirty day ext. of time in which to file pet. for rehg. to and including Feb. 11, 1985, filed. (ml) (Cvs. 83-1047 & 83-1079)
Dec. 27	JUDGMENT — The order of the D.C. entered 1-18-83 which granted in part defendants motion for ajudgment n.o.v. is reversed. The judgment of the D.C is vacated and the cause remanded to D.C. which is directed to reinstate the judgment entered 12-4-81, which is affirmed. Costs taxed in favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court, filed. (ml) (Cvs. 83-1047 & 83-1079)
Jan. 17	Motion of appelleesm cross-appellants, Kaiser Aluminum, et al., for leave to increase the maximum number of pages in their pet. for rehg., to 30 pages filed. (Cvs. 83-1047 & 83-1079) (ml)
Jan. 22	Order (Seitz, C.J.) granting apees, crs-aplts leave to increase the maximum number of pages in pet. for rehg. to thirty pages, filed. (Cvs. 83-1047 & 83-1079) (ml)
Feb. 14	Motion of appellants/cross-appellees for elave to file bill of costs out of time, w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
Feb. 26	Order (Clerk) granting appellants/crs-apees mot. for leave to file bill of costs out of time, (Cvs. 83-1047 & 83-1079) (ml)
March 8	Order (Aldisert, Ch.J., *Seitz*, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker & Rosenn, C.Js.) denying the petition for rehearing in banc. Judge Becker would grant rehearing limited to the price-squeeze issue; together with

Date	*Proceedings*
1985	
	separate statement sur denial of petition for rehearing by Judge Adams. (Cvs. 83-1047 & 83-1079) (ml)
March 13	Motion of apee/crs-aplt., Kaiser Aluminum, et al. for an order staying issuance of mandate, w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
March 15	Response of aplts./crs.-apees. Bonjorno, et al. to apees/crs.aplts. motion for an order staying issuance of mandate, filed. (Cvs. 83-1047 & 1079) (ml)
March 27	Order (Seitz, C.J.) staying issuance of the mandate to and including June 6, 1985, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 1	Motion of appellants/cross-appellees, Bonjorno, et al., for posting of security by appellees/cross-appellants, Kaiser Aluminum & Chemical Corporation, et al., w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
April 8	Response of appees/crs.aplts. Kaiser Aluminum, et al. in opposition to motion of aplts/crs.apees for posting security, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 12	Clerk's letter to counsel, written at the direction of the Court requesting counsel to comment on the applicability of Rule 44.2 of the Rules of the S.C. of the U.S.A., to this matter. Responses due on or before 4-17-85. (Cvs. 83-1047 & 83-1079) (ml)
Apr. 17	Letter dated 4-17-85, from Joseph A. Fillip, Jr., Esq., cnsl for Bonjorno, et al., in response to Court's request of 4-12-85, filed. (Cvs. 83-1043, 83-1079) (ml)
Apr. 17	Letter dated 4-17-85, from Alexander D. Bono, Esq., cnsl for Kaiser, et al. in respcnse to Court's request of 4-12-85, filed. (Cvs. 83-1047 & 1079) (ml)
Apr. 26	Order (SEITZ, CJ) which reads as follows: "the foregoing motion and the response having been considered along with the supplemental briefing and being of the view that I may exercise discretion and

Date	*Proceedings*
1985	
	that appellees/cross-appellants have shown good cause under the present circumstances for not requiring additional security, it is Ordered that the motion is denied", filed. (1047 & 1079) (ch)
1986	
Jun 24	~~Motion by Plaintiffs-Appellants-Cross-Appellees' pursuant to FRAP 37 for inclusion in mandate of instructions regarding interest filed. (Covers 83-1047 & 83-1079) (bjr)~~ WITHDRAWN 6/30/86.
Jun 26	Ltr. dated 6/26/86 rec'd from Michael M. Baylson, Esquire.
Jun 30	Stipulation by cnsl for the parties as follows: 1. The mandate shall issue to the U.S.D.C. for the Eastern Dist of Penna. immediately and shall state that the D.C. should consider all issues immediately and shall state that the D.C. should consider all issues regarding the calculation of interest in this case. 2. Plaintiffs-Aplts -Cross-Appees withdraw, without prejudice, their Motion Pursuant to Fed. R. App. P. 37 for inclusion in Mandate of Instructions regarding Interest. 3. Defendants-Appees-Cross-Aplts. agree that they will not contend that plaintiffs have waived any procedural or substantive claim for interest by this Court not considering the issue of interest Covers 83-1047 and 83-1079, filed. (bjr)
Jul 1	Order *(Seitz,* Gibbons and Rosenn, CJs) approving the above stipulation. The mandate shall issue promptly, filed. (Covs. 83-1047 & 83-1079) (bjr)
1988	
Apr 25	Motion of Applt's cross Aplees to recall & amend the mandate to award post interest pursuant to F.R.A.P. 37, w/serv.fld.,(bj)(cvs.83-1047 & 83-1079)
Apr 27	Ltr dtd Apr 27, 1988, frm R.P.McElroy,Esq., rec'd,

Date	*Proceedings*
1988	
	(bj)(cvs.83-1047/1079)
May 3	Opposition of def-applt-cross-apee to motion to recall & amend mandate to award postjudgment interest pursuant to FRAP 37,w/serv.fld(bj) (cvs. 83-1047/79)
May 5	Aplt rply Memo in support of Motion to Recall & amend Mandate, w/serv.,rec'd for the info of the Court, (bj)(cvs.87-1047/79)(bj)
May 20	Order(Gibbons,Ch.J.,*Seitz* & Rosenn,C.J.'s) denying motion of Plaintiffs-Appellant-Cross-Appellees to Recall & amend Mandate to Award Posjudgment Intrerest, without prejeduce to any direct appeal.,fld.(bj)(cvs.83-1047 & 83-1079)(bj)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET No. 88-1318

Date	*Proceedings*
1988	
June 6	Mot. by aplt. for leave to exceed page limit, filed. (gt) (Cvs. 88-1318/96)
June 7	Order (Clerk) denying above mot., filed. (gt) (Cvs. 88-1318/96)
June 9	Aplt's. mot. for reconsideration of Clerk's 6-7-88 order denying leave to exceed page limit in B, filed. (gt) (Cvs. 88-1318/96)
June 13	Let. from aplt. ddt. 6-12-88, requesting to file B of 70 pages, filed. (gt) (Cvs. 88-1318/96)
June 21	Order (Gibbons) denying mot. for reconsideration of Clerk's 6-7-88 order to exceed pg. limit, filed. (gt) (Cvs. 88-1318/96)
Oct. 11	Motion by aplts-cross-apees for enlargement of time for oral argument for an add'l. 20 min. per side, filed. (adl) (Cvs 1318, 1396)
Oct. 14	Order (Stapleton, Scirica and Cowen) denying above mot., filed. (gt) (Cvs. 88-1318/96)
Oct. 14	Petition of aplts. for leave to furnish argument panel with index to various briefs, filed. (gt) (Cvs. 88-1318/96)
Oct. 12	Aplees'-cross aplts'. memorandum in opposition to mot. for enlargement of time for oral argument and correction of errata in B of aplees'-cross aplts, filed. (gt) (Cvs. 88-1318/96)
Oct. 17	Let. from aplts-cross aplees. ddt. 10-17-88, sent pursuant to 28(j)F.R.A.P., filed. (gt)(88-1318/96)
Oct. 18	Mot. of aplees-cross aplts. to strike all post-briefing submissions of aplts-cross aplees, filed. (gt) (Cvs. 88-1318/96)
Oct. 21	Petition of aplts-cross aplees. to add discrete portions of cnsl's prepared argument not covered at oral

Date	*Proceedings*
1988	
	argument due to time limitations, filed. (gt) (Cvs. 88-1318/96)
Oct. 24	Let. from aplee-cross aplts., ddt. 10-24-88, sent for the information of the Ct., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 24	Memorandum of aplees-cross aplts. in opposition to pet to add discrete portions of cnsl's prepared argument not covered at oral argument due to time limitations, filed. (gt) (Cvs. 88-1318/96)
Oct. 25	Aplts' memorandun in response to Kaiser's post-briefing submissions, filed. (gt) (Cvs. 88-1318/96)
Oct. 26	Let. from aplts. ddt. 10-26-88, in response to aplees. 10-24-88 let., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 26	Response of Kaiser Aluminum to aplts' submission entitled "Equitable Power of Courts to Award Market Rate Interest Above Minimum Rate Designated in Federal Interest Statute, rec'd. (gt)
Oct. 31	Order (Stapleton, Scirica and *Cowen*) denying aplts-cross aplees' 10-21-88 mot. to add discrete portions of cnsl's prepared argument not covered at oral argument, filed. (gt) (Cvs. 88-1318/96)
1989	
Jan 23	Petition For Rehearing In Banc from Kaiser Alum. w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Jan 20	Pet. For Inclusion Of Instructions in The Mandate Regarding Calculation of Interest from Bonjorno, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Jan 27	Response of Kaiser Aluminum & ChemCorp & Kaiser Alum & Chem.Sale,Inc to Petition For Inclusion Of Instructions In The Mandate Regarding Calculation of Interest, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396) (gt)
Feb. 7	Order (Stapleton, Scirica and *Cowen*) granting 10-18-88 mot. to strike, filed.
Feb. 7	Order (Stapleton, Scirica and *Cowen*) denying aplts'

Date	*Proceedings*
1989	
	petition for leave to furnish argument panel with index to the various briefs filed by plaintiff filed. (gt) (Cvs. 88-1318/96) (Cvs. 88-1318/96)
Feb 13	Order (Gibbons, Ch.J. Seitz, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, *Cowen* & Nygaard, C.J.'s) The petitions for rehearing by aplts in 88-1318 & 88-1396 are denied. Judge Stapleton wld have granted in banc for the reasons set forth in his dissent. Judge Becker & Judge Hutchinson wld also have granted rehearing in banc., fld. (bj) (cvs. 88-1318 & 88-1396) (bj)
Feb 13	Order (Stapleton, Scirica & *Cowen*, C.J.) Denying Bonjorno's Pet. For Inclusion of Instructions in Mandate re Calculation of Interest, fld. (bj) (cvs. 88-1318/1396)
Feb 21	Motion by Kaiser, for stay of the Mandate, (90 days) to & including May 14, 1989, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 21	Amended Order (Stapleton, Scirica & *Cowen*, C.J.) The Court's Order filed 2-13-89 is hereby amended & supplemented as follows: The court being of the view that the issue raised should be determined by the D.C. in the first instance, the Petition For inclusion of Instructions in the Mandate is denied, fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 27	Order (Stapleton, Scirica & *Cowen*, C.J.) granting Kaiser's stay of the Mandate to & including March 30, 1989, no further stay to be granted, fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 28	Motion of Appellants-cross appellees For Reconsideration of Order Granting Stay of Issuance of Mandate, w/serv. fld. (bj) (cvs. 88-1318 & 1396)
Feb 28	Motion of appellant-coss appellees, Bonjorno, to Require A bond, w/serv. fld. (bj)

Date	*Proceedings*
1989	
Feb 28	Memorandum of Law of Applts-cross-appellees, Bonjorno, in support of Motion to Require A Bond And In Opposition to Kaiser's Motion to Stay Issuance of Mandate, w/serv. fld., (bj) (cvs. 88-1318 & 88-1396
Mar 2	Ltr dtd 3-2-89 frm A.B. Laupheimer, rec'd. (bj) (cvs. 88-1318 & 88-1396)
Mar 7	Response of (Kaiser) appellees/defendants/cross-appellant to Motion For Reconsideration of Order Granting Stay of Issuance of the Mandate and Motion to Require a Bond, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 8	Reply Memorandum Of Appellants-PLaintiffs-Cross-Appellees (Bonjorno) in Support of Motion to Require A Bond & In Opposition To Kaiser's Motion For Stay of Issuance of the Mandate, rec'd for the information of the Court, (bj) (cvs. 88-1318 & 88-1396)
Mar 20	Order (Stapleton, Scirica & *Cowen*, C.J.) The foregoing Motion by applt-cross0appellees, Bonjorno, et al for reconsideration of Order granting Stay of Issuance of Mandate is Denied. In addition, the motion of Bonjorno, et al., to require a Bond, is Denied., fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 28	Motion For Substitution Of Party by Reason of Death, by Bonjorno et al., w/serv. fld. (bj) (cvs. 88-1318/ & 88-1396)
Mar 29	Order (Clerk) Upon consideration of the Motion of Lorraine Kerr to sub. her as a party as Executrix of Will of G. M. Kerr, Jr., it is hereby Ordered that said Motion is Granted, and Lorraine Kerr is substituted as a party to this action as Exec. of Will of G. M. Kerr, Jr., if there are any future proceedings in this Court, fld. (bj) (cvs. 88-1318 & 1396)
Mar 31	Ltr dtd 3-30-89 frm Laupheimer, Esq., cert. filed at

Date	*Proceedings*
1989	
	US Sup.Ct on 3-30-89, w/serv. rec'd (bj) (cvs. 88-1318/1396)
Apr 5	CC copy of certificate of evidencing docketing on March 13, 1988 at Supreme Court No. 88-1595, frm Clerk of Supreme Ct., fld. (bj) (cvs. 88-1318/96)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET No. 88-1396

Date	*Proceedings*
1988	
June 6	Mot. by aplt. for leave to exceed page limit, filed. (gt) (Cvs. 88-1318/96)
June 7	Order (Clerk) denying above mot., filed. (gt) (Cvs. 88-1318/96)
June 9	Aplt's. mot for reconsideration of Clerk's 6-7-88 order denying leave to exceed page limit in B, filed. (gt) (Cvs. 88-1318/96)
June 13	Let. from aplt. ddt. 6-12-88, requesting to file B of 70 pages, filed. (gt) (Cvs. 88-1318/96)
June 21	Order (Gibbons, Ch.J.) denying mot. for reconsideration of Clerk's 6-7-88 order to exceed pg. limit, filed. (gt) (Cvs. 88-1318/96)
Oct. 11	Motion by aplts-cross-apees for enlargement of time for oral argument for an add'l. 20 min. per side, filed. (adl) (Cvs 1318, 1396)
Oct. 14	Order (Stapleton, Scirica and Cowen) denying above mot., filed. (gt) (Cvs. 88-1318, 1396)
Oct. 14	Petition of aplts. for leave to furnish argument panel with index to various briefs, filed. (gt) (Cvs. 88-1318, 1396)
Oct. 12	Aplees'-cross aplts. memorandum in opposition to mot. for enlargement of time for oral argument and correction of errata in B of aplees-cross aplts, filed. (gt) (Cvs. 88-1318/96)
Oct. 17	Let. from aplt. cross aplees. ddt. 10-17-88, sent pursuant to 28(j)F.R.A.P., filed. (gt)(Cvs. 88-1318/96)
Oct. 18	Mot. of aplees-cross aplts. to strike all post briefing submissions of aplts.-cross aplees. filed. (gt) (Cvs. 88-1318/96)

Date	*Proceedings*
1988	
Oct. 21	Petition of aplts-cross aplees. to add discrete portions of cnsl's. prepared argument not covered at oral argument due to time limitation, filed. (gt) (Cvs. 88-1318/96)
Oct. 24	Let. from aplee-cross aplts., ddt. 10-24-88, sent for the information of the Ct., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 24	Memorandum of aplees-cross aplts. in opposition to pet to add discrete portions of cnsl's. prepared argument not covered at oral argument due to time limitations, filed. (gt) (Cvs. 88-1318/96)
Oct. 25	Aplts' memorandum in response to Kaiser's post-briefing submissions, filed. (gt) (Cvs. 88-1318/96)
Oct. 26	Let. from aplts ddt. 10-26-88, in response to aplees'. 10-24-88 let., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 26	Response of Kaiser Aluminum to aplts' submission entitled "Equitable Power of Courts to Award Market Rate Interest Above Minimum Rate Designated in Federal Interest Statute, rec'd. (gt) (Cvs. 88-1318/96)
Oct. 31	Order (Stapleton, Scirica and *Cowen*) denying aplts.-cross aplees' 10-21-88 mot. to add discrete portions of cnsl'd prepared argument not covered at oral argument, filed. (gt) (Cvs. 88-1318/96)
1989	
Jan 23	Petition For Rehearing In Banc from KAiser Alum, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Jan 20	Petition For Inclusion Of Instructions in The Mandate Regarding Calculation of Interest, frm Bonjorno, w/serv. fld. (bj) (cvs. 88-1318-88-1396)
Jan 27	Response of Kaiser Aluminum & ChemCorp & Kaiser Alum & Chem.Sale,Inc to Petition For Inclusion Of Instructions In The Mandate Regarding Calculation of Interest, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)

Date	*Proceedings*
1989	
Feb. 7	Order (Stapleton, Scirica and *Cowen*) granting 10-18-88 mot. to strike, filed.
Feb. 7	Order (Stapleton, Scirica and *Cowen*) denying aplts' petition for leave to furnish argument panel with index to the various briefs filed by plaintiff, filed. (gt) (Cvs. 88-1318/96) (Cvs. 88-1318/96)
Feb 13	Order (Gibbons, Ch.J. Seitz, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, *Cowen* & Nygaard, C.J.'s) The petitions for rehearing by aplts in 88-1318 & 88-1396 are denied. Judge Stapleton wld have granted in banc for the reasons set forth in his dissent. Judge Becker & Judge Hutchinson wld also have granted rehearing in banc., fld. (bj) (cvs. 88-1318 & 88-1396) (bj)
Feb 13	Order (Stapleton, Scirica & *Cowen*, C.J.) Denying Bonjorno's Pet. For Inclusion of Instructions in Mandate re Calculation of Interest, fld. (bj) (cvs. 88-1318/1396
Feb 21	Motion by Kaiser for stay of the Mandate, (90 days) to & including May 14, 1989, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 21	Amended Order (Stapleton, Scirica & *Cowen*, C.J.) The Court's Order filed 2-13-89 is hereby amended and supplemented as follows: The Court being of the view that the issue raised should be determined by the D.C. in the first instance, the Petition For inclusion of Instructions in the Mandate is denied., fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 27	Order (Stapleton, Scirica & *Cowen*, C.J.) granting Kaiser's Stay of the Mandate to & including March 30, 1989, *no further stay to be granted*, fld. (bj) (cvs. 88-1318 & 88-1396)

Date	*Proceedings*
1989	
Feb 28	Motion of Appellants-cross appellees For Reconsideration of Order Granting Stay of Issuance of Mandate, w/serv. fld. (bj) (cvs. 88-1318 & 1396)
Feb 28	Motion of appellant-coss appellees, Bonjorno, to Require A bond, w/serv. fld. (bj)
Feb 28	Memorandum of Law of Applts-cross-appellees, Bonjorno, in support of Motion to Require A Bond And In Opposition to Kaiser's Motion to Stay Issuance of Mandate, w/serv. fld., (bj) (cvs. 88-1318 & 88-1396)
Mar 2	Ltr dtd 3-2-89 frm A.B. Laupheimer, Esq., rec'd (bj) (cvs. 88-1318/1396)
Mar 7	Response of (Kaiser) appellees/defendants/cross-appellant to Motion For Reconsideration of Order Granting Stay of Issuance of the Mandate and Motion to Require a Bond, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 8	Reply Memorandum Of Appellants-PLaintiffs-Cross-Appellees (Bonjorno) in Support of Motion to Require A Bond & In Opposition To Kaiser's Motion For Stay of Issuance of the Mandate, rec'd for the information of the Court, (bj) (cvs. 88-1318 & 88-1396)
Mar 20	Order (Stapleton, Scirica & *Cowen*, C.J.) The foregoing Motion by applt-cross0appellees, Bonjorno, et al for reconsideration of Order granting Stay of Issuance of Mandate is Denied. In addition, the motion of Bonjorno, et al., to require a Bond, is Denied., fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 28	Motion For Substitution of Party by Reason of Death, by Bonjorno, et al., w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 29	Order (clerk) Uponconsideraiton of the Motion of Lorrain Kerr to substitute her as a party as Executrix of Will of G. M. Kerr, Jr., it is hereby Ordered that

Date	*Proceedings*
1989	
	said motion is granted, and Lorraine Kerr is substituted as a party to this asction as Exec. of Will of G. M. Kerr, Jr., if there are any future proceedings in this Court., fld. (bj) (cvs. 88-1318 & 1396)
Mar 31	Ltr dtd 3-30-89 Laupheimer, Esq. stating cert. filed at US Sup.Ct on 3-30-89, w/serv. rec'd, (bj) (cvs. 88-1318/1396)
Arp 5	CC copy of certificate of evidencing docketing on 3-13-89 at S.C. #88-1595, frm Clk of Sup.Ct., fld. (bj) (cvs. 88-1318 & 1395)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. (a) Do you find from the evidence that there was a conspiracy between Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in unreasonable restraint of trade? Yes ✓ No __

   (b) If your answer to 1(a) is yes, was the conspiracy in unreasonable restraint of trade a material and proximate cause of any injury to the business and property of plaintiff? Yes ✓ No __

2. (a) Do you find from the evidence that the relevant product market was: (CHECK ONE ONLY)

   (i) aluminum culvert and drainage pipe? ✓

   (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum? _____

   (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete? _____

(b) If you find the relevant product market was (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum, or (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete, you should not answer questions 3 or 4; you have concluded your deliberations.

3. If you find in answer to Interrogatory 2 that the relevant product market was (i) aluminum culvert and drainage pipe, do you find from the evidence:

(a) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. monopolized the aluminum culvert and drainage pipe market in that it had the power to control prices or exclude competition in the relevant geographic area which was willfully acquired or willfully maintained? or Yes ✓ No __

(b) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. conspired with regard to aluminum culvert and drainage pipe to control prices or to exclude competitors in the relevant geographic market? or Yes ✓ No __

(c) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. attempted to monopolize the aluminum culvert and drainage pipe market with the specific intent to obtain power to control prices or to exclude competitors and committed an act in furtherance of monopolization which had a dangerous probability of achieving monopolization? Yes ✓ No __

4. If your answer to 3(a), (b), or (c) was yes, was any such defendants' monoply, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of plaintiff? Yes ✓ No __

You have now completed your deliberations.

The Foreperson will place his/her signature on the signature line below and add the date, and the jury will return to the Courtroom.

_____

Foreperson

Date:_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
	:	
– v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reason of an increase in the usage of aluminum coil in 1971, 1972 and 1973?

   State such amount, or "None" in the following blank according to your finding. 57,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by profits lost for the years from June 1, 1973 through May 31, 1977?

   State such amount, or "None" in the following blank according to your finding. 1,048,000

3. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reduction in the value of Columbia as a going concern as of May 31, 1977?

   State such amount, or "None" in the following blank according to your finding. 710,000

/s/
Foreperson

Dated: 8/21/79

KINDLY ADVISE THE MARSHAL WHEN YOU HAVE COMPLETED DELIBERATIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT COMPANY, INC.	:	
VS.	:	CIVIL ACTION
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

CIVIL JUDGMENT

BEFORE Honorable Norma L. Shapiro.

AND NOW, this 21st day of August 1979, in accordance with the Special Verdict of the Jury and the Direction of the Court,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiff, Columbia Metal Culvert Company, Inc., and against the Defendants, Kaiser Aluminum and Chemical Corp. and Kaiser Aluminum and Chemical Sales, Inc., in the sum of FIVE MILLION, FOUR HUNDRED AND FORTY-FIVE THOUSAND ($5,445,000.00) DOLLARS.

8/22/79 entered and copies:
Michael M. Baylson
Blank, Rome, Klaus & Comisky

BY THE COURT:

ATTEST: /s/
Ellen N. Starr
DEPUTY CLERK

bcc: Robert L. Price, Esquire
Civ 1 6/72

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. JUNE 17th, 1981

INTRODUCTION

Post-trial motions in this antitrust litigation are before the court pursuant to a limited remand order of the United States Court of Appeals for the Third Circuit. Defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") move for a judgment notwithstanding the verdict or, in the alternative, for a new trial, following a jury verdict in favor of Columbia Metal Culvert Co., Inc. ("Columbia")[1] finding KACC and KACSI in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and awarding damages in the sum of $1,815,000. Judgment was entered for the plaintiff in the trebled amount of $5,445,000.

1. Upon liquidation of Columbia, all of its claims, rights and interest in this litigation were assigned to its shareholders, Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby; the current named plaintiffs were substituted as parties pursuant to Fed.R.Civ.P. 25(c) by the court's Order of May 30, 1980.

Columbia originally brought suit against KACC and KACSI and former Columbia salesman Robert A. Kennedy and the company he owned, Kennedy Culvert and Supply, an independent distributor of culvert and drainage pipe manufactured by KACSI. The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §15. At the jury trial held before the Hon. Edward N. Cahn, a directed verdict for all defendants was entered at the close of Columbia's case on the ground that Columbia had not made out a *prima facie* case of conspiracy in restraint of trade between KACC/KASCI and the Kennedy defendants. The district court further found that the product market was not limited to aluminum culvert pipe as Columbia had maintained but included culvert pipe whether made from either aluminum or steel. Since the Kaiser share of the aluminum and steel culvert pipe market was concededly not significant, the court held that Kaiser could not have monopoly power. The court further found that no *prima facie* violation of Section 3 of the Clayton Act had been proven. *See, Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum and Chemical Corp.*, Civil Action No. 74-122 (July 20, 1977).

On appeal by Columbia, the Third Circuit reversed in part and affirmed in part. The Court affirmed the grant of a directed verdict in favor of the Kennedy defendants on the issue of conspiracy. The Court also upheld the district court's finding that no *prima facie* case of a Clayton Act violation had been proven. However, the grant of a directed verdict in favor of defendants KACC and KACSI was reversed. The Court held that:

> (1) There was sufficient evidence to allow a jury reasonably to conclude that a relevant market for Sherman Act purposes was composed of aluminum culvert only rather than culvert of either aluminum or steel;
>
> (2) There was sufficent evidence to go to the jury on the charge that KACSI and KACC violated §2 of the Sherman Act by monopolizing or attempting to monopolize the aluminum culvert market; and

(3) There was sufficient evidence to go to the jury on the charge that KACC and KACSI conspired in restraint of trade in violation of §1 of the Sherman Act.

Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 37 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

A bifurcated trial before this court resulted in a determination of defendants' liability in answer to special interrogatories (attached to this opinion as Appendix A); the jury found that the relevant product market was for aluminum culvert pipe, that defendants KACC and KACSI had monopolized, attempted to monopolize, and conspired to monopolize this market in violation of Section 2 of the Sherman Act; that KACC and KACSI had conspired in violation of Section 1 of the Sherman Act; and that Columbia had been injured by the unlawful acts of KACC and KACSI.

The jury then awarded damages in the amount of $1,048,000 for lost profits, $710,000 for the destruction of Columbia as a going concern, and $57,000 for the cost of extra metal (relating to Columbia's spiral [illegible]ior making pipe), a total of $1,815,000, which trebled re[illegible]ted in a judgment of $5,445,000. Following a second appeal, the case was remanded to the district court for disposition of post-trial motions.[2] (Docket Entry #426). Columbia having won a jury verdict at trial, we consider the following facts in the light most favorable to plaintiff.

Columbia was a company specializing in the manufacture and marketing of aluminum culvert pipe with a plant in Vineland, New Jersey. KACC manufactures aluminum sheet and coil from which aluminum culvert pipe is constructed and conveys these materials to its wholly-owned subsidiary KACSI, which in turn sells the sheet and coil to pipe manufacturers such as Columbia. KACSI also fabricates and sells aluminum culvert

2. A direct appeal was taken because defendants failed to file post-trial motions timely. The Court of Appeals, upon defendants' motion, allowed a limited remand to this court to have the benefit of the trial judge's views upon the issues in contention.

pipe itself in competition with the fabricators to whom it supplies sheet and coil.

These three entities had a successful business relationship for many years during which Kaiser was Columbia's main material supplier. Beginning in 1971, a four-pronged effort took place to put Columbia out of business in retaliation for Columbia's placing of aluminum orders with Reynolds Aluminum. This KACC/KACSI effort included a refusal to sell to Columbia, a decision to locate a new culvert manufacturing plant within fifty miles of Columbia's plant, setting up Robert A. Kennedy, Columbia's best salesman, in business as an independent distributor of KACSI products, and a "price squeeze" by KACC and KACSI, accomplished by transferring sheet and coil from KACC to KACSI below cost. This allowed KACSI to make a profit on sales of pipe at prices which Columbia could not match; the price of aluminum was increasing and the supply of the metal was severely limited.

The Kaiser defendants move this court for a judgment notwithstanding the verdict, on the ground that Columbia produced insufficient evidence to support the verdict in several material respects. In the alternative, defendants move for a new trial on the ground that the verdict was contrary to law, against the weight of the evidence, and that the court erred in certain evidentiary rulings, in jury instructions, and in submission of certain interrogatories to the jury.

In ruling on a motion for judgment N.O.V., "it is the duty of the trial court to take that view of the evidence most favorable to the party against whom the motion is made, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for him." 6A *Moore's Federal Practice* §59.08[5] at pg. 59-152 (1979). On the other hand, a motion for new trial, on the ground that the verdict was against the weight of the evidence, is addressed to the sound discretion of the trial court. *Id.*

POST-TRIAL MOTIONS – LIABILITY

Defendants' contentions must fail in view of the Circuit Court's opinion in *Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corporation,* 579 F.2d 20 (3d Cir. 1978), *cert. denied,* 439 U.S. 876 (1978) and the doctrine of the law of the case.

As noted in *Otten v. Stonewall Ins. Co.,* 538 F.2d 210, 212 (8th Cir. 1976):

> This court has repeatedly held that the decision on former appeal is the 'law of the case' on a question presented in that former appeal, *unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal,* and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless the decision is clearly erroneous and works manifest injustice. (emphasis supplied, citations omitted).

See, e.g., United States v. American Bag & Paper Corp., 609 F.2d 1066, 1067, n.3 (3d Cir. 1979) (determination by panel of Court of Appeals was law of the case and later panel was bound by it); *Skehan v. Board of Trustees of Bloomsburg State College,* 590 F.2d 470, 482 (3d Cir. 1978), *cert. denied,* 444 U.S. 832 (1979) (Court of Appeals' prior opinions were law governing the case with respect to question of whether it was permissible to remand plaintiff's due process claims to district court and district court's observations on remand were of no effect); *Chlystek v. Kane,* 540 F.2d 171, 173 (3d Cir. 1976) (Court of Appeals governed by law of the case from prior appeal with respect to whether a substantial federal question was present); *Spock v. David,* 502 F.2d 953, 955 (3d Cir. 1974), *reversed on other grounds,* 424 U.S. 828 (1976) (on essentially the same record as was before the Court of Appeals prior to remand, both the district court on remand and the panel of the Court of Appeals on appeal following remand were bound, with respect to issue decided by the Court of Appeals prior to remand, by decision on that issue as the law of the case); *A.M. Webb & Co. v. Robert P. Miller Co.,* 176 F.2d 678, 680-81 (3d Cir. 1946) (on

trial after remand of case, questions settled by Court of Appeals could not be relitigated); *Moyer v. Aetna Life Insurance Co.,* 126 F.2d 141, 143 (3d Cir. 1942) (law of case on prior appeal as to sufficiency of the evidence on certain points precluded reconsideration thereof upon defendant's appeal of district court denial of judgment N.O.V. after second trial).

This court is bound by the Third Circuit's decision on issues presented and decided explicitly or implicitly in the prior appeal. *See, Todd and Company, Inc. v. SEC,* 637 F.2d 154 (3d Cir. 1980). For this reason we reject Kaiser's initial contention in its brief in support of post-trial motions, that because KACSI is "wholly owned and controlled" by KACC (Defendant's Brief in Support of Motions at 2), the two corporate entities are incapable of a conspiracy for lack of the requisite plurality of actors. The Third Circuit explicitly rejected this argument as "not well-founded in law," and reaffirmed the viability of the "intra-enterprise conspiracy theory" as applied to separate corporate entities. *Columbia Metal, supra* at 33. *See, Cromar Company v. Nuclear Materials and Equipment Corp.,* 543 F.2d 501, 511 (3d Cir. 1976) (absence of the appearance of competition between parent corporation and wholly-owned subsidiary not a bar to Section 1 Sherman Act liability.) This court may not reconsider that determination.

A simililar fate befalls Kaiser's contention that there was insufficient evidence to support a finding of an unlawful conspiracy between KACC and KACSI, insufficient evidence to support a finding that KACC or KACSI had a specific intent to monopolize or to wilfully maintain monopoly power, insufficient evidence to support a finding that the relevant product market was aluminum culvert and drainage pipe alone, and insufficient evidence to support the court's charge on the price squeeze issue. The Third Circuit explicitly found the evidence sufficient to allow a jury to find for Columbia on each of these points. *Columbia, supra* at 37.

The law of the case doctrine precludes a reconsideration of that determination unless the evidence at the second trial was *substantially* different from that considered by the appellate court. *Otten, supra.* However, the evidence which the Court of

Appeals found sufficient as to each of these points was substantially repeated in the second trial.

Product Market

The evidence persuasive to the Third Circuit on the product market issue, *Columbia, supra* at 29-31, essentially repeated itself at the second trial. For example, there again was testimony that aluminum is a specialty material[3] and that there are specialized vendors of aluminum products.[4] Several witnesses testified that the physical properties of the three types of manufactured culvert pipe, steel, concrete and aluminum, differ significantly.[5] Because of these differences, evidence at the second trial again showed that specifications for construction projects require one type of culvert rather than another.[6] From this evidence a jury might infer that distinct markets exist for aluminum, steel and concrete pipe, at least from the contractor's point of view. *See, Columbia, supra,* at 28.

The record here shows, as did the record before the Court of Appeals, that a jury would not act unreasonably in finding that, "patterns of action on the part of engineers who specify the type of culvert to be used establish aluminum as a separate market." *Columbia, supra* at 28. Again, there is testimony that price was not a crucial factor in these engineering decisions[7] and

3. *E.g.,* N.T. 248 (Bonjorno) (". . . aluminum was always a specialty product. It was during the sixties, and it was during the early seventies, and it was at the period and point in time that we're talking about. . . ."); N.T. 681 (Arvay) (". . . aluminum again becomes a very highly specialized product. . . ."); *See,* Plaintiff's Brief in Opposition to Defendants' Motions at 9.

4. *E.g.,* N.T. 2848 (specialized in aluminum "as far as a storm drainage product. . . . "); N.T. 17 (Bonjorno).

5. *E.g.,* NT. 874, 879, 882-883, 885-886, 888-889, 893-894 (Elam). *See,* Plaintiff's Brief in Opposition to Defendants' Motions at 9.

6. *E.g.,* N.T. 904, 915, 916 (Elam); N.T. 1698 (Price).

7. *E.g.,* N.T. 919 (Elam) (". . . you are going to specify that product in most instances where price is not even a factor . . ."); N.T. 680 (Arvay) (". . . as far as the price situation is concerned, that is not the concern to them . . . ."); N.T. 1701 (Price); *See,* Plaintiff's Brief in Opposition to Defendants' Motions at p. 8.

that the three culvert products are neither interchangeable nor in competition from an engineering standpoint.[8]

Defendants also argue that steel and aluminum culvert may share the same production facilities as an indicia of products in the same market for Sherman Act purposes. The fact that the same production facilities can be used to turn out steel and aluminum culvert and even the fact that companies often manufacture both products is insufficient to preclude the existence of separate markets as a matter of law; *Columbia, supra,* at 29 n.30.

Defendants vigorously assert that the evidence does not support the jury's finding of an aluminum culvert product market. (*See,* Defendants' Brief in Support of Motions at pp. 99-109). Defendants point to extensive testimony, particularly that of defendants' expert, Dr. Epstein, supportive of their view. But the jury rejected defendants' testimony on these points and accepted that of the plaintiff; the Court of Appeals has already determined that plaintiff's evidence would reasonably support such a jury finding.

Thus this court accepts the jury finding of an aluminum culvert pipe product market, as sufficiently supported by the evidence.

Unlawful Conspiracy Between KACC and KACSI

The evidence found sufficient to prove unlawful conspiracy between the defendants, *Columbia, supra* at 34-35, was also placed before the jury in the second trial. Again there was evidence that KACC and KACSI combined to impose a price squeeze. For example, there was evidence from which the jury could infer that Collins of KACSI had no part in setting the

8. *E.g.,* N.T. 1408 (Chafin) (". . . it [aluminum] has inherent characteristics which are different from the other materials . . .); N.T. 918 (Elam):

> "Q. Now taking your professional group, the Drainage Engineers and engineers who design drainage systems and design culvert and specify different commodities of culvert, in your opinion, does that group view these products, steel, aluminum and concrete as interchangeable?"
>
> "A. No, I don't think they do."

specification price of coil, which was a KACC price (N.T. 171, 1972, 1957), that Collins was chastised by KACC for not getting prices up high enough (P-950, N.T. 2277, 2281, 2560), that Collins reported to the Sheet and Plate Division of KACC (N.T. 2307, 1718-20), that someone higher than Collins was responsible for the price increase crucial to this litigation (N.T. 1972), that KACC transferred coil to KACSI below cost (N.T. 1964, P-823) and that Collins' request for a plant in New Castsle, Delaware was approved by KACC (N.T. 1792, 2114, 2317, 2372, 1976, P-204, 210). *See,* Plaintiff's Brief in Opposition to Defendants' Motions at pp. 12-13. From this and other information adduced at trial, the jury might again infer that "the pricing policies of KACSI were not independent . . . but rather arrived at jointly with KACC." *Columbia,* 579 F.2d at 35. Although there was evidence from which a contrary finding might have been made (*see,* Defendants' Brief in Support of Motions at pp. 32-59), we find the evidence was sufficient to support the jury's conclusion that KACC and its wholly-owned subsidiary, KACSI, conspired in violation of the Sherman Act.

Intent to Monopolize

Defendants argue that plaintiff's evidence was insufficient to support the jury's finding that the Kaiser defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act (*see,* Defendants' Brief in Support of Motions at pp. 60-99). Judge Cahn's directed verdict for defendants on this issue at the first trial resulted from his related finding that steel and aluminum, rather than aluminum culvert pipe alone, must constitute the relevant product market. The Third Circuit, as discussed above, found that it was not unreasonable to conclude that culvert pipe alone constituted a relevant market, and therefore that "the foundation of the directed verdict on the §2 count collapses." *Columbia,* 579 F.2d at 31. The Court of Appeals also stated that there was sufficient evidence to infer that KACSI, an entity controlling 80% of the market, attempted to drive Columbia out of business. *Columbia,* 579 F.2d at 31. That same evidence persuasive to the Court of Appeals was

presented to the jury at the second trial. Holmes Collins' threat to place an aluminum culvert plant near Columbia if Columbia purchased from Reynolds, and the later placement of a plant in New Castle, Delaware (N.T. 1228) that was originally planned for Virginia, (N.T. 1533, 1540-1541, 1730), were submitted to the jury. Again, there was evidence that, "transportation of culvert is a significant item of expense for the product in question and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery" (*Columbia, supra* at 31), from which the jury might infer intentional harm caused Columbia by Kaiser's placement of its plant (N.T. 2317-2318, 2840). Again, an inference could be drawn from evidence that the Delaware KACSI plant sold culvert at lower prices than other plants even though Delaware costs were no lower (N.T. 1734, 2544-2545), that KACC transferred sheet and coil to KACSI at an accounting price less than production cost and well below market price (N.T. 1964, 3654), and that Collins of KACSI extended credit to Kennedy, formerly a Columbia salesman, against the recommendation of the KACSI credit department (N.T. 1849-1863, 2525-2529, 2842-2849, 2854, 2997, Exhibits P-75, P-24, P-5). The Arvay testimony, specifically noted by the Third Circuit, *Columbia, supra* at 31, n.43, again supported plaintiff's theory (N.T. 719, 729, 752). Finally, an inference that Kaiser controlled more than 80% of the relevant market was again reasonably supported by the evidence. (N.T. 73-75, 780, 1261, 1809, 1810, 1814, 2509, Exhibit P-201). Therefore, the evidence was sufficient to support the jury's conclusion that the defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act.

In summary, on the liability issues, the evidence on retrial was not substantially different from that considered by the appellate court and must be deemed sufficient to support the jury's finding in favor of the plaintiff. Moreover, not only was the evidence sufficient, the court in the exercise of its discretion does not find the jury's determination so against the weight of the evidence as to shock the conscience of the court. Therefore, a new trial would be denied on all issues of liability. The court

has carefully considered all other grounds raised by defendants in their motion for judgment notwithstanding the verdict and, with the exception of ground eleven (11) relating to damages and discussed *infra*, determines them to be without merit.

DAMAGES

The trial of this matter having been bifurcated, after the jury verdict on liability against defendants, two days of testimony on damages followed; the jury, again upon answers to special interrogatories (attached hereto as Appendix B), then found damages in favor of plaintiff in these amounts: 1) $57,000 for increased costs of metal; 2) $1,048,000 for lost profits; and 3) $710,000 for the reduction in the value of Columbia as a going concern. The total damage award by the jury was $1,815,000. The jury's award was trebled in accordance with the remedy provided in Section Four of the Clayton Act, 15 U.S.C. §15; the final judgment in plaintiff's favor is in the amount of $5,445,000.

Defendants raise numerous objections as to the award of damages.

Causation

Defendants argue that plaintiff did not establish the requisite causal link, under Section Four of the Clayton Act, between the financial damage suffered by Columbia and the defendants' violation of the antitrust laws. Defendants assert that they are entitled to judgment in their favor if the damages to the plaintiff were caused in whole or in part by factors other than defendants' violations of the antitrust laws.[9] Defendants assert that Joseph Bonjorno, Columbia's chief witness and shareholder, on cross-examination identified several reasons, other than defendants' activities, for losses suffered by Columbia during the relevant time period. Among those causes cited by defendants are: the recession in the construction industry,[10] a nationwide aluminum

9. *See,* Defendants' Brief in Support of Motions for Judgment N.O.V. or for a New Trial at p. 11 (citing cases).
10. *See,* N.T. 3903-3905.

shortage,[11] the inability of Columbia to obtain price protection from suppliers,[12] and the unstable financial condition of Columbia's chief financial backer, George Kerr.[13]

Damages attributable to an antitrust violation are recoverable even when factors other than defendant's wrongful acts alone may have contributed to the plaintiff's injury. 15 ANTITRUST LAWS AND TRADE REGULATION §115.01[2] (1978). In this case there was sufficient evidence, if accepted by the jury, to show that Columbia's business decline was caused by Kaiser's illegal activity. Mr. Bonjorno stated repeatedly, both on direct and on cross-examination, that the injury to Columbia was caused by Kaiser's illegal activity.[14] He also stated that in projecting damage figures he had considered the legal competition of others in the marketplace. (N.T. 3971). He further stated that the damage projections did not go beyond a point where it was simply too difficult to determine "who was responsible for what" (N.T. 3858). When cross-examined as to other possible causal factors in Columbia's decline, Bonjorno either asserted that these factors were not significant or that Kaiser's illegal activity had made Columbia particularly vulnerable to troubles that, absent such wrongdoing, would not have created financial problems.[15] The jury had before it, through this adept cross-examination, those other factors. However, the jury found that Kaiser's illegal activity caused the financial harm suffered by Columbia. Damages for injury by antitrust violations may be implied even though other factors may have contributed to the injury. *See, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946); *Switzer Brothers, Inc. v. Locklin*, 297 F.2d 39 (7th Cir. 1961), *cert. denied*, 369 U.S. 851 (1962). Here, plaintiff did show, with the requisite reasonable certainty, an injury in consequence of Kaiser's conduct. *See, Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1976), *cert. denied*, 426 U.S.

11. *See,* N.T. 3908, 3909.
12. *See,* N.T. 3911-3918.
13. *See,* N.T. 3919, 3920.
14. *E.g.,* N.T. 3864, 3865, 3902, 3904.
15. *E.g.,* N.T. 3907, 3908, 3910, 3912, 3913.

935 (1976). Judgment notwithstanding the verdict on causation would be improper.

Duplication in Damages Award

Defendants assert that, when the jury returned a verdict of $1,048,000 for loss of profits during 1974-1977 and $710,000 for the reduction in the value of plaintiff's business as a going concern as of May 1, 1977, Columbia was awarded a double recovery for the same loss. Defendants' theory for this duplication argument is not clear but seems to include these contentions. Defendants first argue that plaintiff's recovery of lost profits in this action together with the amount received from the sale of Columbia's assets to Howmet in 1977 for $574,000 fully compensated plaintiff for its losses because the value of Columbia as a going concern was the amount received from Howmet at the time of sale. Receiving damages for business as a going concern under this theory duplicates the money paid Columbia by Howmet in 1977 *not* the lost profits awarded by the jury at trial. A part of this argument is that either Howmet paid for Columbia's total going concern value as of May, 1977 (including goodwill) or that Howmet bought only Columbia's assets; i.e., all Columbia had left at that time, as Columbia itself asserts. If the latter is the case, Kaiser argues that projected lost future profits should not add to a going concern value since Columbia, defunct as of 1977, could have no future profits.

Defendants next contend that the method of calculating the damage to Columbia as a going concern caused a duplication between the two theories of damage recovery. Defendants state that the same figures used to calculate past lost profits, were used to project Columbia's profits into the future, post 1977, to arrive at a going concern value. (A going concern value indirectly reflects future profits as "[t]he current market value of a business is, in theory, the discounted present value of the estimated flow of future earnings." *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, 1023 (D.N.J. 1976), *reversed on other grounds*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) *rehearing denied*, 438 U.S. 908

(1978).) This, defendants maintain, created an impermissible duplication since the same figures establish both damage theories.[16] Finally, defendants argue that a recovery for going concern value and lost profits is generally not allowed.

We will deal with the last contention first. As noted in 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[1] (1978), "there are three types of damages that a successful antitrust plaintiff may recover under Section 4: (1) increased costs; (2) lost past net profits; and (3) reduction in the value of the business. *Absent unique circumstances, these three types are not duplicative of each other.*" (emphasis supplied). Numerous cases support this general proposition. *See, Story Parchment Co. v. Patterson Parchment Paper Company*, 282 U.S. 555, 561 (1931) ("[t]he trial court submitted to the jury for consideration only two items of damages, (1) the difference, if any, between the amounts actually realized by petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents' and (2) the extent to which the value of the petitioner's property had been diminished as the result of such acts."); *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, *supra*, (involved damages for both lost profits and going concern value); *Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1081 (2d Cir. 1980) ("[t]he district court ruled that ABP was entitled to compensation for two categories of injuries—lost profits on sales that were prevented prior to the termination of its Sony dealership, and the reduction in the value of ABP's business resulting from the termination"); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (lost profits and goodwill loss, determined in part by reference to potential for future profits); *Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971) (sufficient compensation included damages in amount of profits lost prior to the forced sale of the business *plus* its full market value, absent the illegal practices). Thus in this case, absent some unique circumstance, it is clear that plaintiff is entitled to both the lost past profits as of the time of the sale to Howmet and the value of the business, as it would

16. *See*, Defendants' reply brief at P. 51.

have been absent defendants' violation of law, in May of 1977 upon Columbia's termination.

Defendants claim that the method of calculating going concern value created duplication in the damages award since going concern value was calculated, in part, by using the past lost profit figures in order to project potential future profits. Defendants assert that this method allowed plaintiff to recover its lost profits twice. However, several cases, discussing damages calculations in the antitrust area, have explicitly or implicitly endorsed this method of determining going concern value. For example, in *Eiberger, supra,* at pp. 1081-1082, n.25, the court stated:

> 25. Although it is unclear, Sonam may also be arguing that the district court erred when it included in the one-year base period figures an amount for profits that ABP would have earned on sales lost as a result of Sonam's intimidation. Such an argument is clearly incorrect. ABP is entitled to an award that covers all of the profits it would have earned but for Sonam's violation: these include both the profits lost while ABP was still an authorized dealer, and the profits it would have earned after that point, which when capitalized equal 'going concern' value of the lost portion of ABP's business. *See, Farmington Dowel Prods. Co. v. Forster Mfg. Co.,* 421 F.2d 61, 80-82 (1st Cir. 1970). *To exclude lost profits from the base period figures used to project the latter component would be to reduce plaintiff's award for the later period precisely because defendant's intimidation had been successful in the base period. Such a reduction would obviously be improper.* (emphasis supplied).

Similarly, in this case, it was appropriate that the calculation of Columbia's value as a going concern included as its base figure, not the past profits depressed by defendants' violations, but the past profit history as it would have been but for the violation.

Of similar import is *Copper Liquor, Inc. v. Adolph Coors Co., supra* at 579 n.9, where the court described the calculation of a retail liquor store's goodwill value, in a case where plaintiff

sought both lost profits and good will:[17]

> 9. Relying on the assumption that the store reduced its markup from 25 percent to 15 percent in 1966, Green calculated the store's goodwill value by adding the lost gross profits for each year of the store's operation to the net profits for the store as they appeared on the store's corporate income tax returns. The sum of lost gross profits and net profits for the four years, 1967 to 1971, was identified as adjusted net income. Adjusted net inome, in the amount of $100,046, was divided by the number of years to obtain average net income. Mr. Green then subtracted from average net income the store's return on capital computed at 6 percent per year to derive average net income after return on investments. This figure, $21,980, was multiplied by five to arrive at a goodwill value of $109,899.

Again past lost profits were taken into account in the figure from which goodwill was projected. Finally, by way of example, the district court in *Glauser, supra* at 1023 n.14, made the following observations on this point:

> 14. Since the challenged practices continued for several years leading up to the elimination of Glauser Dodge from the marketplace, the plaintiff properly presented to the jury estimates of the value of the business as a going concern based upon its actual performance in prior years *and, alternatively, based upon the earnings which the business would have had absent the defendants' unlawful conduct.* (emphasis supplied).

In the instant situation, then, we find no merit to defendant's contention that the method of computation used in this case created a duplication.[18] Rather, by adding Columbia's

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17. "Valuing a business's goodwill, of course, is a subjective determination that takes into consideration factors such as a business's age, profit history, customers, and *potential for future earnings.*" (emphasis supplied). Copper Liquor Co., *supra,* at 579 n.8.

18. Defendants' cited cases can be read to support plaintiff's position. Rea v. Ford Motor Company, 497 F.2d 577 (3d Cir. 1974), *cert. denied,* 419 U.S. 868

estimated profit figures in those prior years and then projecting forward for future profits, Columbia quite appropriately measured its value as a going concern from its estimated 1977 condition had there been no prior damage caused by defendants. Necessarily, this method creates a projection based upon a projection but it is defendants' prior misdeeds that make such a formulation necessary.

Finally, we consider defendants' contention that Columbia's recovery for going concern value duplicated the amount received in 1977 ~~when~~ Columbia transacted its sale to Howmet. Plaintiff asserts that the transaction with Howmet was a sale of assets only, since Columbia, having been destroyed as a business by Kaiser, had no good will value left. Both Bonjorno[19] and Dr. Kuehn so testified.[20] If this is the case, Kaiser argues that

NOTES *(Continued)*

(1974), involved a finding of double recovery under the Automobile Dealer's Act where the damages for lost future profits did not reflect the fact that plaintiff had sold certain assets for $60,000. Defendants cite it for that proposition. However, the court in Rea, at 587 n.19, stated that "neither the trial judge's instructions on damages nor Dr. Staelin's estimate made mention of or took into account the benefit 22 Ford received from the cash. . . ." Clearly the Howmet purchase price was taken into account in this case; defendants' in their Reply Brief at p. 51 note Dr. Kuehn's assumptions regarding the Howmet sale in the going concern value computation. Also, in Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969), *supp. order*, 421 F.2d 91 (1st Cir. 1979), cited by defendants, the court allowed plaintiff to recover both its lost profits to the date it went out of business and the going concern value of the plaintiff on that date.

19. N.T. 3864 (Bonjorno):

"A. Well, we--as long as we were operating we had our good name. We had our reputation and our ability to maufacture a high quality product, our ability to manufacture a high quality product, our ability to work and get our product specified. This as all part of Columbia Metal and its good name in the aluminum culvert pipe industry in the trading area, and they effectively destroyed this.

Q. Who is they?

A. Kaiser Aluminum."

20. N.T. 4041 (Kuehn):

"Q. Well, do you make an assumption as to what the actual value was as a going concern on May 31, 1977?

there was no reasonable prospect that Columbia would have earned profits in the future. However, Columbia's value as a going concern, that is its market value to Howmet, would certainly have been greater if its goodwill, and thus its potential for future profit, were intact.[21] If Howmet paid only for tangible assets, Columbia did not receive the worth of its business absent the violation which destroyed its goodwill. If Columbia indeed had no reasonable prospect of future profits, that indicates more damage to Columbia, not less damage to its going concern value.

As an alternative characterization, defendants assert that whatever intangible value Columbia had, assuming it had some, was paid for by its 1977 purchase by Howmet. It was plaintiff's express assumption that Howmet bought only tangible assets (N.T. 4041) and that its projection of ". . . the value of the business was computed in terms of whether the rates of return from the operation of this business in the absence of damage produced or would have produced a return in excess of the profits that might be expected from the tangible assets alone. In other words, was there additional profit that would then be attributed to intangibles which would indicate some value of good will relative to the operation of the business." (N.T. 4039-4040). *Compare*, *Pitchford v. PEPI, Inc.*, 531 F.2d 91 (3d Cir. 1975) (failure to deduct Mr. Pitchford's salary as a cost of

A. Yes.

Q. What is that?

A. Well, the assumption is that the value of the firm on that date was limited to physical assets, and consequently that there was no operating value beyond the sheer value of the assets that existed.

Q. And based on what you know about this case, is that a reasonable assumption?

A. Given that--given the actual operation of the firm in the previous years in the damaged state, I would say yes."

21. *See*, Copper Liquor, Inc., *supra*, at 579 n.8:

"According to Cook's expert, Wayne Peters, goodwill is the amount that a purchaser would be willing to pay for a business *over and above the value of the business's tangible assets*. Valuing a business's goodwill, of course, is a subjective determination that takes into account factors such as *potential for future profit*." (emphasis supplied).

operation from data used to project potential earnings for the purpose of evaluating the lost going concern value of Pitchford created a double recovery).

On cross-examination, Dr. Kuehn, confronted with the purchase agreement between Howmet and Columbia, which allocated $16,000 of the purchase price for intangibles,[22] stated that amount should be subtracted from certain of his estimates, since his projections assumed the Howmet sale involved assets only.[23] Whatever amount was actually received for intangibles must be subtracted from the estimates to avoid an award of damages for an amount that is duplicative in the sense that it has already been recovered.

Increase in Metal Costs

Plaintiff claimed damages for lost profits for the years 1974, 1975 and 1976 but in addition made a specific claim for extra costs attributable to an increase in the amount of aluminum coil used in 1971, 1972 and 1973; plaintiff contended this increase in metal cost was caused by the misrepresentations of defendants concerning the gauge of aluminum Kaiser would continue to use. The Stamco machine plaintiff installed in the spring of 1970 utilized a 2-inch gauge because Kaiser used that gauge; the rest of the industry used a 2-⅔-inch gauge. Kaiser, which had used 2 inch, then converted to 2-⅔ inches; plaintiff contends that Kaiser concealed its intention to do this to put plaintiff at a competitive disadvantage. This had been presented to the jury

22. Corporate name and covenant not to compete.

23. N.T. 4149 (Kuehn):

> "According to the figure I just saw, the purchase price of the tangible assets apparently would be $564,000 and consequently, if I understand it correctly, $16,000 should probably be subtracted from the various estimates presented here on the bottom lines for both the capitalization at 15% and the capitalization at 20%."

However, Dr. Kuehn also indicated that the two items on the intangibles line of the purchase agreement actually had no worth. *See*, N.T. 4146 (corporate name); N.T. 4147 (covenant not to compete). (For the other inadequacies of Dr. Kuehn's testimony, see N.T. 4018-4019, 4050-4051, 4089, 4092-4093, 4108-4109, 4111.)

during the trial on liability, not as an antitrust violation in itself but as a part of a pattern of conduct from which retaliatory conduct could be inferred. Plaintiff admitted it could not isolate damages for other aspects of its proof on retaliatory conduct but urged that a finding of specific damages for extra use of coil was appropriate. Because plaintiff stated to the jury that damages would be claimed only for 1974, 1975 and 1976, the court was in error in allowing the extra cost of metal for prior years to go to the jury as a separate item of damages; that plaintiff was able to isolate it as a matter of proof (N.T. 3981-3995) is not a sufficient reason to allow it as an item of damages in the context of the trial as a whole. Therefore, the award of $57,000 ($171,000 trebled) is set aside and the defendants' motion for judgment notwithstanding the verdict is granted as to that amount.

Sufficiency of the Evidence as to Amount of Damages

We recognize that once the fact of injury has been proven, the burden on the antitrust plaintiff to establish the "precise amount of damages is not as great as in other kinds of lawsuits." 15 ANTITRUST LAWS AND TRADE REGULATION §115.01[2] at 115-5 (1978). *See*, *J. Truett Payne Co. Inc. v. Chrysler Motors Corporation*, 49 U.S.L.W. 4516 (1981); *Copper Liquor Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (less rigid standard of proof with respect to amount of damages caused by an antitrust violation); *Hobart Brothers Co. v. Malcolm T. Gilliland Inc.*, 471 F.2d 894, 902 (5th Cir. 1973), *cert. denied*, 412 U.S. 923 (1973) ("[i]n an anti-trust case the burden on the plaintiff to prove the amount of damages is less severe than the burden to prove the fact of injury . . . ."); *South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767, 796 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971), *rehearing denied*, 404 U.S. 877 (1971) ("The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections . . . . "). However, a plaintiff must offer proof as to the extent of injury, showing that the damage involved is measurable in dollars. *See*, *Deaktor v. Fox Grocery*

Company, 475 F.2d 1112 (3d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973). Further, courts have stated repeatedly that the measure of damages may not be based upon mere guesswork, speculation, or conjecture. *E.g.*, *Bigelow v. RKO Radio Pictures, Inc.*, *supra*; *Story Parchment Co. v. Paterson Parchment Paper Co.*, *supra*; *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

Although plaintiff did show economic injury in consequence of defendants' conduct, the evidence presented by Columbia as to the actual dollar amount of damages suffered was so deficient as to require a new trial on damages only. The evidence presented by Columbia's two damages witnesses, Bonjorno and plaintiff's expert witness on damages, Dr. Alfred Kuehn, was incomplete, confusing and generally lacking in probative value. The factual basis of the projections, predictions and calculations presented by them was never clear from the testimony.

Plaintiff estimated damages sustained in lost profits and in the decline in value of the business as a going concern by using four projection Methods (Methods C, D, E, and F). Method C (P-3012), projected Columbia's sales based upon government figures on new housing starts and new highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while method E (P-3014) used Kaiser sales from the New Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendants' wrongdoing.

The testimony of an antitrust plaintiff who is an owner or officer of the damaged business may be sufficient to support a jury verdict on damages where the owner is qualified by experience and position to make damages estimates. *See, generally, Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 122, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969) (Zenith's officers, experienced businessmen, testified that repressive effects on Zenith were due to patent pool; no basis in record for refusing to accept testimony of the two officers as probative evidence);

Greyhound Computer v. International Business Machines, 559 F.2d 488, 507 n.41 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (most of the damages testimony came from Greyhound's president; where the record reflects his competency and the factual basis for his conclusions, an interested witness may testify as to the amount of damage and it is for the jury to determine the weight to be accorded his testimony); *Kestenaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (wholesale distributor's estimation of good will value of his business admissible in antitrust suit as an owner is competent to give his opinion on the value of his property; weight and credibility given owner's testimony is generally for the jury); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 394 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957) ("We do not hold or imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, the record must show their competency and the factual basis upon which they rest their conclusions. . . .").

But an inexperienced owner using purely speculative bases for his estimations of damage may provide testimony of such minimal probative force as to warrant a judge's refusal to submit the issue to the jury. *See, Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D.Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961, *cert. denied*, 369 U.S. 839 (1962). It follows that such testimony would justify the grant of a new trial in the exercise of the court's discretion.

We do not find that Mr. Bonjorno was an inexperienced owner who was not qualified to make damage estimates. Bonjorno started Columbia in 1959 and performed proprietary, managerial and sales functions from Columbia's beginning until its assets were sold in 1977. However, we do find the record insufficient in establishing the requisite factual basis for Bonjorno's estimates so that the jury could make a rational determination as to their accuracy.

For example, Bonjorno estimated Columbia's return on sales at 17.6% for 1974, 12% for 1976 and 8% for 1977, all significantly higher than that of any previous year of Columbia's

operation; the previous high was only 5.8%. Bonjorno's explanation for this increase demonstrates the minimal evidence upon which this five million dollar verdict rests:

N.T. pp. 3959-3960:

"Q. What was the reason why you projected so much greater profitability in 1974 than you had experienced in your entire history?

A. A number of reasons, Mr. McElroy.

Number one, we would have had a much lower metal cost due to the new configuration. The fact that we were making standard corrugated pipe meant that the material costs would be down by approximately 4 to 5%.

Q. All right.

A. We now were in a position to offer perforated pipe made on our own perforating mill, which would have been a highly profitable product, also, and would have given us an access to other markets.

It would have also given us a much higher percentage of profit in those areas that were remote to southern New Jersey, because the prices were better in areas away from southern New Jersey than they were in the southern New Jersey area, so that we felt we would have a substantially greater margin of profit on the sales that we projected.

Q. So that you would have increased your profitability from 2.6% to 17.6% in one year? That's an increase of 15%.

A. I thought that was reasonable."

N.T. pp. 3958-3959

"Q. You've projected, in 1974, $1,805,569 in sales and you have an income of $318,683.

Do you know what that percentage is?

A. It looks like its around 15%. I'm not sure without calculating it.

Q. It is 17.6%. 17.6%.

Now, on Exhibit 3062 is there any year in which return on sales exceeded 10%?

A. No, there is not.

Q. Is there any year in which it exceeded 5%?

A. No, there is not.

Q. Isn't there one? 1971?

A. 5.8, I'm sorry.

Q. 5.8% and that was the best year, 5.8%?

A. Yes.

Q. And yet, you projected an income of 17.6% here?

A. Yes."

Also troubling was Bonjorno's estimate as to the pounds of metal sold in 1973 by Columbia, a critical figure since 1973 was the base year selected by the plaintiff as his starting point for all other damage calculations and projections. Although Bonjorno did state a figure before the jury (N.T. 3932: "[a]pproximately, I think they are about 2.3 or 2.4 million pounds, approximately."), the basis in fact or source of the figure was never explained. (N.T. 3932-3942). For example, at N.T. 3933,

"Q. And did you make a compilation for this trial so you could present it to the Court and jury of what the number of pounds were of metal that Columbia sold in 1973?

A. No.

Q. Didn't counsel or anybody--wasn't anybody assigned to go through the records to find out exactly what the total number of pounds was?

A. It's possible, but I didn't do it.

Q. And you are unaware of anybody else doing it?

A. It's possible that counsel may have done it. I am sorry, maybe I misunderstood your question.

Q. My question was, do you know whether anybody did it or not?

A. I don't know specifically.

That the jury was unpersuaded by the Bonjorno testimony is plain from its damage verdict on lost profits which virtually

cuts the Bonjorno estimate in half. The Bonjorno testimony of his hopes and aspirations fails to provide evidence of facts from which the jury's calculation may be logically and legally inferred.

There are similar problems regarding the damages testimony of the expert, Dr. Kuehn. Again, the problem of the pound figure for 1973 without a source appears.

"Q. Why did you convert it back to pounds?

A. Only to provide a base number for the subsequent calculation of other ratios.

Q. But the number of pounds doesn't represent what Columbia actually sold in 1973, does it?

A. I --

Q. That you calculated.

A. Since I am not sure that anyone knows precisely what the pounds are, it probably doesn't represent accurately, but it's the calculation that was obtained this way and which Mr. Bonjorno considered a fairly accurate estimate of what the actual figure was during that period.

Q. Did you review any of Columbia's books and records to determine whether or not your estimate of the number of pounds sold by Columbia for fiscal year ending May 1, 1973, was accurate or not?

A. I reviewed some records, but to the best of my knowledge--I am not sure whether one can determine precisely whether it's accurate or not. *I certainly didn't establish that it's accurate.*" (N.T. 4092-4093) (emphasis supplied).

The confusion with regard to that particular figure was merely symptomatic of the general confusion and ill-preparedness of the witness, which was admitted by plaintiff's attorney in his closing argument to the jury:

Dr. Kuehn I think was poorly prepared to defend that basic computation that he gave you. It took him too long and he should have been better prepared. (N.T. 4197).

While recognizing the importance of expert testimony in antitrust proof of damages, 16 A.L.R. Fed. 14, 22 (1973),[24] and the fact that Dr. Kuehn qualified as one competent to offer an opinion in such matters, we determine that the illusion of complete accuracy created by graphs, charts, and garbled expert testimony created a speculative verdict in this case. *See, Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) ("The leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take.").

Of the methods for calculating plaintiff's damages, we have already considered Method F that relied upon the estimates of Joseph Bonjorno. Method C, that projected Columbia's sales based upon government figures on new housing starts and new highway construction, was completely repudiated by the testimony of plaintiff's expert. Dr. Kuehn could not explain the relevance, if any existed, of these figures to Columbia's business or to its losses:

"Q. And the Federal Government publishes statistics on new highway construction?

A. Data are published on both, yes.

Q. On both what?

A. Highway construction and housing.

Q. Now, the highway construction, that's new highways, isn't it?

A. That's correct.

Q. That does not include reconstruction, maintenance or repair, does it?

A. That's correct.

Q. And the housing starts are new housing starts?

A. It's based on new housing, yes.

Q. That would not include reconstruction or repair of existing storm sewers, for example?

A. That's correct.

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24. "Measure and Elements of Damages Under 15 USCS §15 Entitling Person Injured in His Business or Property by Reason of Anything Forbidden in Federal Antitrust Laws to Recover Treble Damages."

Q. Now, do you know what percentage of Columbia's business was in new highway construction?
A. *I believe very little.*
Q. Most of it was, in fact, in reconstruction and maintenance, wasn't it?
A. That's my understanding.
Q. Do you know whether there is any relationship between new highways and the use of culverts?
A. Well, new highways and aluminum culvert?
Q. Any culvert?
A. *I would assume there is some.*
Q. You assumed it?
A. *Yes, because at least most highways I see, you know, there tends to be some culverts.*
Q. And that's what you based your estimation of damages on, your assumptions, that when you go along the highway you see some culverts along the road?
A. I used this method as the first of four methods since certain data were here I certainly didn't think it was perfect.

I thought it might be related, but that is precisely why in my explanation of which of the varous methods I preferred *I listed this as probably the poorest of the four methods.*

I don't consider this necessarily a very good index." (N.T. 4050-4051) (emphasis supplied).

The remaining two methods, utilizing Kaiser nationwide sales (Method D) and Kaiser New Castle sales (Method E), were never adequately explained to the jury. (N.T. 4018-4019).

Although the "yardstick" measure of an antitrust claimant's lost profits, under which the claimant recovers the difference between his net profits during the damage period and the net profits earned in a comparable business unaffected by antitrust violations, is a valid method of estimating damages, 16 A.L.R. Fed. 14, 45 (1973), in this instance the evidence presented was insufficient to establish that the entities used were truly comparable or that the estimates were adjusted to reflect the

differences between the businesses compared. *See, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103, *affirmed*, 164 F.2d 1021 (3d Cir. 1946).

Lapses of this nature are frequent in Dr. Kuehn's testimony. Kuehn never could explain how the comparisons in Methods D and E were made in view of the fact that Columbia operated on a fiscal year and Kaiser operated on a calendar year (N.T. 4057-4068). Kuehn maintained that the calendar year fiscal year problem would make little difference, however he admitted that he had never calculated it to so determine. (N.T. 4089). Kuehn relied upon the 17.5% normal mark-up of former Columbia salesman, Robert Kennedy, in order to calculate Kaiser's average selling price per pound; however, this figure was not of record in the testimony on damages or liability. Kuehn had difficulty explaining why his calculation of damages for cost of goods sold included a variable cost equal to 11.17% of sales. (N.T. 4108-4109), why an interest expense factor of 7.5% was utilized, and how such interest rate was calculated. (N.T. 4111).

Although Dr. Kuehn's confusion is apparent from a reading of the transcript (N.T. 4003-4150), a reading does not make plain the great diffuculty this witness had in responding to questions. On numerous occasions, Dr. Kuehn was unable to answer an inquiry without referring to documents, was unable to find the appropriate figure within the relevant document, and when a figure was located unable to state how it was calculated or why it was used. All of this shuffling of paper and accompanying long silences occurred before the jury. At one point it was necessary to call a luncheon recess in order to give Dr. Kuehn sufficient time to answer a question posed upon cross-examination. The total effect was that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained.

We also recognize that a flexible standard of proof applies where the defendant's wrong doing, here the destruction of plaintiff's business, has made it impossible, as a practical matter,

for the plaintiff to produce a more precise figure, *see, Bigelow, supra* at 262-266, but in this case the brief trial on damages seemed almost an afterthought following the extended trial on liability. Plaintiff's action was originally instituted in 1974. The delay occasioned by the directed verdict for defendants at the end of the plaintiff's case at the first trial and the subsequent appeal prior to the instant trial on remand may be responsible for some of the deficiency in proof. It seemed obvious to the court that plaintiff's expert, a well-qualified and experienced witness, must have understood the basis for his conclusions when they were initially stated. However, on the witness stand as of the date of this trial, Dr. Kuehn was unable to explain, at least in an unconfused manner, the derivation of his figures or their basis in fact notwithstanding the time provided to him by the court for this purpose. Whatever the reasons for this inability, the trial court is convinced that the jury verdict could only be a product of confusion and speculation.

Mindful of the delay that has occurred snce the limited remand, and the economic loss occasioned to plaintiff thereby in the erosion of the money judgment due to the difference between legal interest and the market rate, we are reluctant to incur even further delay and have considered whether the delay itself is a reason not to disturb the verdict of the jury. We also gave serious consideration to ordering a remittitur, an action within the trial court's discretion where a jury awards an amount the court deems excessive. 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[2] at p. 115-70 (1978); however, no reasoned basis could be found for setting an appropriate figure. The deficiency in plaintiff's proof of damages convinces the court that the verdict as to damages should not stand.

Where there is no substantial indication that liability and damage issues are inextricably interwoven or that the jury verdict was the result of compromise of liability and damage questions, a second trial on the damages alone is proper. *See, Wagner v. Reading Co.*, 428 F.2d 289 (3d Cir. 1970); *Darbrow v. Brown*, 255 F.2d 610 (3d Cir. 1958); 11 Wright and Miller, Federal Practice and Procedure §2814 (1973). In this bifurcated trial, it is clear there was no compromise of liability and damage

questions. The separateness of the trials is also substantial indication that liability and damage issues are not inextricably interwoven. The court has also considered whether hearing the evidence on liability is necessary to persuade the jury to award damages in an adequate amount and is convinced that the case on liability can be stated to the jury with the facts and inferences most favorable to plaintiff, consistent with the verdict in its favor. Both the plaintiff and defendants will benefit from this opportunity to present damage testimony to the jury in a clear and unconfusing fashion. In any event, fairness to the defendant requires no less.

For the above reasons a new trial as to damages only is granted. An appropriate Order accompanies this Memorandum.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	No. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. (a) Do you find from the evidence that there was a conspiracy between Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in unreasonable restraint of trade? Yes X No ___
   (b) If your answer to 1(a) is yes, was the conspiracy in unreasonable restraint of trade a material and proximate cause of any injury to the business and property of plaintiff? Yes X No ___
2. (a) Do you find from the evidence that the relevant product market was: [CHECK ONE ONLY]
   (i) aluminum culvert and drainage pipe? X
   (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum? ___
   (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete? ___
   (b) If you find the relevant product market was (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum, or (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete, you should not answer questions 3 or 4; you have concluded your deliberations.

3. If you find in answer to Interrogatory 2 that the relevant product market was (i) aluminum culvert and drainage pipe, do you find from the evidence:
   (a) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. monopolized the aluminum culvert and drainage pipe market in that it had the power to control prices or exclude competition in the relevant geographic area which was willfully acquired or willfully maintained? or Yes ✓ No ___
   (b) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. conspired with regard to aluminum culvert and drainage pipe to control prices or to exclude competitors in the relevant geographic market? or Yes ✓ No ___
   (c) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. attempted to monopolize the aluminum culvert and drainage pipe market with the specific intent to obtain power to control prices or to exclude competitors and committed an act in furtherance of monopolization which had a dangerous probability of achieving monopolization? Yes ✓ No ___
4. If your answer to 3(a), (b), or (c) was yes, was any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of plaintiff? Yes ✓ No ___

You have now completed your deliberations.

The Foreperson will place his/her signature on the signature line below and add the date, and the jury will return to the Courtroom.

/s/ Flora Eikenkoetter

Foreperson

Date: 8/16/79

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reason of an increase in the usage of aluminum coil in 1971, 1972 and 1973?

   State such amount; or "None" in the following blank according to your finding. $ 57,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by profits lost for the years from June 1, 1973 through May 31, 1977?

   State such amount; or "None" in the following blank according to your finding. $1,048,000

3. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reduction in the value of Columbia as a going concern as of May 1, 1977?

   State such amount; or "None" in the following blank according to your finding. $ 710,000

Flora Eiherenkoetter
Foreperson

Dated: 8/21/79
5:30 p.m.

KINDLY ADVISE THE MARSHAL WHEN YOU HAVE COMPLETED DELIBERATIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of June, 1981, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. Plaintiff's Motion for Leave to File a Supplemental Brief is GRANTED.

2. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $57,000 in response to Interrogatory One as to damages and otherwise DENIED.

3. The Motion of defendants for a New Trial is GRANTED as to damages only.

4. A pre-trial/status conference will be held on July 17, 1981 at 1:00 p.m. to consider preparation of a case stated on liability and any other further proceedings, including a special listing for trial, provided the Court of Appeals does not grant the pending motion to revoke the limited remand.

BY THE COURT:

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	No. 74-122

ORDER

AND NOW, this 15th day of July, 1981, upon Order of the Court of Appeals for the Third Circuit entered July 8, 1981, it is ORDERED that:

The judgment in the sum of $5,445,000 entered August 22, 1979 in favor of Columbia Metal Culvert Company, Inc. and against Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. is hereby VACATED.

BY THE COURT:

/s/ Norma L. Shapiro
J.

bcc: Robert L. Price, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINIUM & CHEMICAL CORP. AND KAISER ALUMINIUM & CHEMICAL SALES, INC.	:	NO. 74-122

PLAINTIFFS' PRE-TRIAL STATEMENT RE: DAMAGES
DATED: SEPTEMBER 8, 1981

* * *

C. *Damages – Concept*

The concept behind Plaintiffs' damages evidence has been to estimate, from data available, and drawing conclusions from the data, the profits Columbia would have made without Kaiser's illegal acts, from June 1, 1973 through May 31, 1977; and to then calculate the value the business would have had as a going concern without Kaiser's illegal acts, as of May 31, 1977, deducting the amount received for the tangible assets. This is the same theory of damage which the Court held proper in its opinion dated June 17, 1981.

* * *

G. *Time Period For The Computation of Damages*

The basic analysis is to estimate what Columbia lost as a result of Kaiser's illegal actions. The beginning of the damage period has been described in the testimony as June 1, 1973, the beginning of Columbia's fiscal year. (N.T. 3865-66) The damages in this case are the profits Columbia lost up to May 31, 1977, (N.T. 3858), and then how much the value of Columbia as a going concern had been diminished as a consequence of Kaiser's illegal actions, as of May 31, 1977.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA CLISBY,	:	CIVIL ACTION
vs.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

Philadelphia, Pennsylvania
November 30, 1981

BEFORE: HONORABLE NORMA L. SHAPIRO, J.

APPEARANCES:

DUANE, MORRIS & HECKSCHER
BY: MICHAEL M. BAYLSON, ESQ.,
for Plaintiffs.

BLANK, ROME, COMISKY & McCAULEY
BY: RICHARD P. McELROY, ESQ., and
ALEXANDER D. BONO, ESQ.,
for Defendants.

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* * *

MR. BAYLSON: Your Honor, I just think it would be very unfair to divide these into two time periods. There is no testimony. Mr. Draper said that they couldn't have continued in business past '75, but he said specifically he wasn't asked to calculate damages. He was only doing a calculation of what lost profits would have been. Then Dr. DiPodwin came in and said this was a proper period.

THE COURT: Let me ask you, I am not trying to resolve it now because I have to see these people and give you a choice whether you want to come in early tomorrow morning or talk to me later this evening. I am willing to com ein early tomorrow morning if you would prefer or stay, but I have an awful lot of lawyers waiting that I would like to see. The concern that I have is maybe dealt with—you are talking about not dividing years in any of these questions.

MR. BAYLSON: Right.

THE COURT: Is to be able to mold the verdict to avoid duplication. That is my concern, and it does seem to me, and maybe I could do it by instructing the jury, but if they find that the business should have closed in '75, for example, and they award the damages as a going concern in '75 it seems to me, Mr. McElroy, without agreeing you can there was evidence from which they could find the value as a going concern in '75.

MR. McELROY: Well, I don't know that there is.

MR. BAYLSON: Your Honor, another reason this is very unfair. We had all these pretrial statements, experts who computed damages on the same four-year fiscal period. Dr. DiPodwin. It is very unfair after the evidence comes in that they propose interrogatories dividing it.

THE COURT: All right. You're ahead of the game right now. You are persuasive.

MR. BAYLSON: I will stop.

THE COURT: Let me make my point. I will tell you that Mr. McElroy's way of putting it has a surface appeal to me, and bearing in mind how unfair you consider it I have given some thought that in itself it is not entirely persuasive. I assume what one of you proposes the other will object to, but what I have to

do is avoid duplication of damages. Now, if the jury buys Mr. McElroy's argument that they should have closed in '75 and gives a going concern value as of '75 there would be duplication if they also found lost profits from '75 to '77, and actual losses. When do the actual losses stop?

MR. BAYLSON: The actual losses are up to '77 too.

MR. McELROY: They never did.

THE COURT: In other words, it is clear to me that you are entitled to loss of profits projected until the time the plaintiff goes out of business, but when the plant goes out of business you are entitled to its going concern then. You are not entitled to both loss of profits and going concern value for the same period.

MR. BAYLSON: I agree.

THE COURT: We are all agreed on that. So, the question for me is how do I convey that concept to the jury. Your answer is easy. You say don't let them consider that the business should have closed before '77.

MR. BAYLSON: No, that is not.

THE COURT: If it should have closed before '77 then I have to tell them that because of loss of profits, actual losses, you determined the going concern value at an earlier time.

MR. BAYLSON: If your Honor gives some instructions on the loss that are proper which I am sure you will, then they are going to find accordingly.

MR. McELROY: But they are going to be looking at an interrogatory that says '74 to '77. That's the problem.

THE COURT: What I did was just eliminate the date.

MR. McELROY: That might do it.

THE COURT: And say as of the time that you determine.

MR. McELROY: Yes. It isn't a question in my mind of when they should have gone out of business. The is when they did go out of business, May 31, 1975. You measure at the termination of the business, that is May 31, 1975. All adding those two years does is add approximately $500,000 to $600,000 worth of losses by keeping the doors open.

THE COURT: Is it your point that the value of the business in 1975 was the same as its value in '77, was the same as a going concern?

MR. McELROY: No, I would presume it is less because the project profits were less.

MR. BAYLSON: No, I am not sure. It may be more.

THE COURT: Because they haven't suffered all the losses. The actual value. If that business had been sold to Howmet in '75 instead of '77 based not on projected losses or what would have happened but what actually did happen could a jury—it isn't what we think. Could a jury reasonably find it could have had a higher value.

MR. BAYLSON: Sure, because its operating history before that would have been better. I think the damages projections were higher. The major point is it is confusing the jury because in the context of all the pretrial statements and what Dr. DePodwin himself said now they are being asked to divide this four-year period in half, and it is going to make me look stupid or the plaintiffs look stupid. We are talking about four years and the charge says we have to divide it in half.

THE COURT: You would have had subtotals on your charts.

MR. BAYLSON: At the minimum, and have Dr. DePodwin make computations. They made their statements on the four-year period and their experts give predictions on the four-year period, and my experts, and then come in and ask for interrogatories dividing it in half. It is confusing and an unfair state of affairs.

MR. McELROY: I don't know of anything that requires the defendant to agree with his damage period. And I don't.

THE COURT: No, but the interrogatories have to fairly address the issues at trial, and what I have been trying to do is to get these interrogatories in such a form that I could mold the verdict, but I can't allow my efforts to do that to get so specific that makes the trial unfair.

MR. McELROY: If your Honor feels that Mr. Baylson makes a point that now having two sets of questions as to two different periods of time is unfair I think it is actually unfair to us to say that there is one period '74 to '77 and maybe some balance can be struck by eliminating the dates.

THE COURT: That's what I am thinking of doing exactly.

MR. McELROY: And we are free to argue whatever we want to.

THE COURT: Yes, and they are. Now, is it your pleasure to come back later tonight or early tomorrow morning?

Off the record.

(Discussion off the record.)

(Concluded in Chambers.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

Philadelphia, Pennsylvania
December 1, 1981

BEFORE: HONORABLE NORMA L. SHAPIRO, J.
(and a jury of eight)

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* * *

First, plaintiffs are seeking the actual losses that Columbia incurred while it was still doing business.

Second, the plaintiffs are seeking lost profits that they project Columbia would have made from the sale of culvert pipe if the antitrust laws had not been violated.

* * *

With regard to the actual losses Columbia is claiming profits lost during its fiscal years 1974 through 1977 in this category. I am referring here to losses actually and reasonably sustained as a result of Kaiser's violation of the antitrust laws.

* * *

You are not to presume just because Columbia suffered financial losses or went out of business that all such losses are

caused by Kaiser. The plaintiff, as I said, must prove those financial losses are setbacks that were caused by Kaiser and establish some reasonable basis in the evidence for the damages that you find.

Similarly it follows from that that you should not award plaintiffs damages for losses caused not by Kaiser but by conditions in the economy in general or a recession in the construction industry, aluminum shortage, a lack of price protection for long-term requirement contracts.

* * *

Columbia's damage computations are based on the contention that Columbia suffered injury until the close of its 1977 fiscal, May 31, 1977.

Kaiser contends that Columbia was in effect out of business by 1975 and should have been terminated by then, indeed called attention to the fact that this lawsuit began in 1974 and contends that the actual losses after that date would not have been reasonably suffered, and that Columbia's projected loss of profits thereafter are not valid. So, it contends that the value of the loss of the business as a going concern, if any, should properly be determined as of that date in 1975.

Columbia contends that its business was effectively terminated in June 1977 when it would have been forced to cease operations and close its doors but for the government loan it received.

If you find this is reasonable based on the evidence you may award an amount based on loss of profits until May 31, 1977 and value of the business as a going concern as of that date, but if you find that the plaintiffs failed to close down or liquidate Columbia when it was reasonable to do so under the circumstances shown by the evidence then you should reduce the amount of their damages by the amount that you believe was sustained after the point in time when Columbia should have closed down. For example, if you find it was not reasonable for Columbia to have continued in business and to have sustained losses after a certain date then you can't award damage for lost profits beyond then.

Likewise if you find that it was unreasonable for Columbia to continue in business beyond a certain date and you award

damages for the loss of value, the going concern value of the business, you should calculate that going concern value as of the date you believe it was reasonable for Columbia to have ceased operations.

The important thing is that you make every effort and you do not duplicate the damages under each of these various elements the plaintiff is entitled if you feel that the plaintiff met its burden as to each of these elements but not to a duplication. Each one of them once.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

Philadelphia, Pennsylvania
December 2, 1981

BEFORE: HONORABLE NORMA L. SHAPIRO, J.
(and a jury of eight)

APPEARANCES:

DUANE, MORRIS & HECKSCHER
BY: MICHAEL M. BAYLSON, ESQ.,
for Plaintiffs.

BLANK, ROME, COMISKY & McCAULEY
BY: RICHARD P. McELROY, ESQ., and
ALEXANDER D. BONO, ESQ.,
for Defendants.

(In court 9:30 a.m.)

THE COURT: Good morning.

Off the record.

(Discussion off the record.)

THE COURT: Will you bring the jury in, please.

(Jury present 9:41 a.m.)

THE COURT: Good morning. This is the kind of morning when you don't mind being here inside, and if your deliberations should continue during the day the government will provide you with lunch, and your order will be taken in mid-morning so that it can come to you on time.

I told you yesterday when you left that you must not discuss this matter with your family or friends, and because you are a deliberating jury and it was so important that when you returned this morning I would ask each of you whether you have refrained from reading about this in the newspapers listening to anything about it on the radio, learning anything about the case on television, and whether you have also refrained from discussing it with your family and friends in accordance with my instructions. Rather than repeat that question to each of you you will understand that this same question is addressed to each of you, and I will ask for your individual responses.

Mr. Davidson, have you followed the instructions of the Court? Have you refrained from discussing this with your family and your friends.

JUROR NO. 1: No.

THE COURT: No you have not refrained, or no you have not discussed it?

JUROR NO. 1: I have not.

THE COURT: Discussed it.

JUROR NO. 1: That's right.

THE COURT: And you haven't learned anything about it outside the courtroom on the radio or T.V. have you?

JUROR NO. 1: Right.

THE COURT: Mr. Masanti, have you refrained from discussing this matter with your family and friends?

JUROR NO. 2: Yes.

THE COURT: Have you learned anything about it outside the courtroom?

JUROR NO. 2: No.

THE COURT: Mr. Napp, have you discussed this with your family or friends or anyone else than the jurors in the jury room?

JUROR NO. 3: No, I have not.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 3: No.

THE COURT: Mr. Thourson, have you refrained from discussing this with anyone?

JUROR NO. 4: Yes, I have.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 4: No.

THE COURT: Ms. McPharlan, have you followed the instructions of the Court and refrained from discussing it?

JUROR NO. 5: I did, your Honor.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 5: No.

THE COURT: Mr. Majasky, have you refrained from discussing the matter?

JUROR NO. 6: Yes, I have.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 6: No.

THE COURT: Mr. Woodington, have you refrained from discussing this with anyone since you left here yesterday?

JUROR NO. 7: Yes, I have.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 7: No, ma'am, I have not.

THE COURT: Ms. Fitz, have you refrained from discussing with persons other than the jurors and not discussed it since you left yesterday?

JUROR NO. 8: Yes.

THE COURT: Have you heard anything about the matter outside the courtroom?

JUROR NO. 8: No.

THE COURT: Thank you. With that I will send you back to the jury room to resume your deliberations, and my deputy, Ms. Starr, will continue to be your contact if there is any problem. Thank you. Good morning.

(Jury out to resume deliberations 9:46 a.m.)

(In court 2:23 p.m.)

THE COURT: Will you bring in the jury, please.

(Jury present 2:24 p.m.)

THE COURT: Good afternoon, ladies and gentlemen. Who is the foreperson that you have selected.

JUROR NO. 7: I am, your Honor.

THE COURT: All right.

Ladies and gentlemen, I have been advised that you have reached a verdict. Is that correct?

(General affirmative response by the jurors.)

THE COURT: Now I will ask the foreperson to answer the questions that I address to you, and I ask you to listen carefully because at the conclusion of his responses I will then ask each of you if that is also the verdict of each of you as to each and every question that is asked.

Mr. Woodington, in what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia?

JUROR NO. 7: $728,000.

THE COURT: In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe?

JUROR NO. 7: $742,520.

THE COURT: In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to

Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet?

JUROR NO. 7: $80,000.

THE COURT: In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business?

JUROR NO. 7: $1,638,793.

THE COURT: Thank you.

Ladies and gentlemen, you have heard the verdict and I will ask each of you if that is your response to each question as well.

Mr. Davidson.

JUROR NO. 1: Yes, it is.

THE COURT: On all the questions?

JUROR NO. 1: What was that?

THE COURT: Was that the verdict of yours as well as the jury? Do you agree that is what you decide?

JUROR NO. 1: Yes.

THE COURT: As to each question?

JUROR NO. 1: No.

THE COURT: Which question was not your answer?

JUROR NO. 1: I didn't get you.

THE COURT: Was that your answer to question 1?

JUROR NO. 1: Oh, yes.

THE COURT: Was that your answer to question 2?

JUROR NO. 1: Yes.

THE COURT: Was that your answer to question 3?

JUROR NO. 1: Yes, ma'am.

THE COURT: And was that your answer to question 4?

JUROR NO. 1: Yes, ma'am.

THE COURT: Mr. Masanti, was that your response to all the questions?

JUROR NO. 2: Yes.

THE COURT: Mr. Napp, was that your answer to all the questions?

JUROR NO. 3: Yes, it was, your Honor.

THE COURT: Mr. Thourson, was that your answer to all the questions?

JUROR NO. 4: That's right.

THE COURT: Ms. McPharlan, was that your answer to all the questions?

JUROR NO. 5: Yes.

THE COURT: Mr. Majasky, was that your answer?

JUROR NO. 6: Yes, your Honor.

THE COURT: Mr. Woodington, was that your answer as well as the jury's?

JUROR NO. 7: Yes.

THE COURT: And Ms. Fitz, was that your answer?

JUROR NO. 8: Definitely, your Honor.

THE COURT: Thank you very much, and I want to thank you for the time and effort that you have spent in addressing yourselves to the issues and to the evidence presented which was sometimes technical and not always easy to understand, and with that I want to excuse you and wish you a good day. Your service as jurors has been concluded, but you are entitled to a certificate of thanks for your service and they will tell you down in the jury office how you obtain that and any further instructions that you have to get.

Thank you and good afternoon.

You may not keep your notes. You will leave them with my deputy, please, and leave the original verdict form, please.

(Jury excused.)

MR. BAYLSON: Your Honor, I would ask that the verdict be recorded and judgment entered trebled the amount of the verdict.

THE COURT: The verdict will be recorded as it was in the presence of the jurors, and I will enter the judgment later. I have to do the arithmetic. I will issue an order today requiring post trial motions within ten days, and as we agreed yesterday that within 14 days of the filing of the post trial motions the moving party will serve and file a memorandum of law in support of the post trial motion or motions. A memorandum of law in opposition must be served and filed within ten days thereafter. I will hold oral argument on Friday, January 29 at 9:00 o'clock.

Thank you. That concludes the proceedings in this case. Thank you all very much.

MR. McELROY: No, it doesn't.

THE COURT: That concludes them for the time being. We will recess.

(Concluded at 2:30 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia?	None___	$ 728,000
2. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe?	None___	$ 742,520
3. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet?	None___	$ 80,000
4. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business?	None___	$1,638,793

/s/ _____
Foreperson

Date: 12/2/81

PLEASE NOTIFY THE MARSHAL
WHEN DELIBERATIONS HAVE BEEN COMPLETED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISKY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
vs.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

CIVIL JUDGMENT

Before Honorable Norma L. Shapiro

AND NOW, this 2nd day of December 1981, in accordance with the Jury's answers to interrogatories and the direction of the Court that the verdict be trebled according to law.

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc. and against the Defendants Kaiser Aluminum and Chem. Corp. & Kaiser Aluminum & Chem. Sales, Inc. in the sum of NINE MILLION, FIVE HUNDRED SIXTY-SEVEN THOUSAND, NINE HUNDRED AND THIRTY-NINE ($9,567,939.00) DOLLARS.

BY THE COURT: Norma L. Shapiro

ATTEST: Norma L. Shapiro, J.

Civ 1 (8/80)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. JANUARY 17, 1983

INTRODUCTION

Before the court are post-trial motions arising out of a retrial on damages only in this antitrust litigation. Following the entry of judgment for plaintiffs on the jury's answers to four special interrogatories in the trebled amount of $9,567,939, defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial on both liability and damages.

Plaintiff Columbia Metal Culvert Co., Inc. ("Columbia"), a liquidated corporation (interest in this litigation has been assigned to the present plaintiffs, its former shareholders), originally brought an action against KACC and KACSI, former Columbia salesman Robert A. Kennedy and his company, Kennedy Culvert and Supply, in which it alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §14. A detailed description of the specific actions complained of and the procedural history of this case is contained in the Memorandum

accompanying the Order of June 17, 1981 published at 518 F. Supp. 102 (E.D.Pa. 1981).

At the first trial before The Hon. Edward N. Cahn, judgment in favor of defendants was entered on defendants' motion for a directed verdict at the close of Columbia's evidence on the grounds that Columbia, formerly a manufacturer and distributor of aluminum culvert pipe, had not established a *prima facie* case of conspiracy in restraint of trade between KACC and KACSI or between either and Kennedy, proved that Kaiser had monopoly power in the relevant product market, or established a *prima facie* violation of Section 3 of the Clayton Act. The Third Circuit affirmed the grant of a directed verdict as to Kennedy but reversed as to KACC and KACSI, except on the Clayton Act count. Sufficient evidence was presented to allow a jury to decide the relevant product market, whether KACC/KACSI had monopolized or attempted to monopolize that market, and whether KACC and KACSI conspired in violation of Sections 1 and 2 of the Sherman Act.

On remand and transfer to the docket of this court, there was a bifurcated trial by jury. The jury found on answers to special interrogatories that the relevant product market was aluminum culvert and draingage pipe, that KACC and KACSI had monopolized and attempted to monopolize the relevant product market, that KACC and KACSI had conspired in violation of Sections 1 and 2 of the Sherman Act, and that Columbia had been injured by the unlawful acts of KACC and KACSI. Damages awarded in the amount of $1,815,000 were trebled and judgment entered in favor of plaintiffs for $5,445,000. Following a direct appeal (because defendants post-trial motions were untimely filed), the case was remanded to this court by the Court of Appeals for disposition of Kaiser's motions for a judgment notwithstanding the veredict or in the alternative for a new trial.

We denied Kaiser's motions for judgment notwithstanding the verdict or a new trial as to liability because the evidence at retrial was not substantially different from that previously held adequate by the Court of Appeals; the jury's determination was not so against the weight of the evidence as to shock the

conscience of the court. 518 F. Supp. at 102. However, judgment notwithstanding the verdict was granted as to the first interrogatory on damages (awarding defendants $57,000 for Columbia's increased usage of aluminum coil in 1971-73). *Id.* at 114. A new trial was granted on the second and third interrogatories, awarding $1,048,000 in losts profits from 1973 to May 31, 1977 and $710,000 for loss of going concern value thereafter.

Plaintiffs had presented only two damages witnesses, plaintiff Bonjorno himself and an expert, Dr. Alfred Kuehn. The record was found insufficient to establish the requisite factual basis to allow the jury to make a rational determination of the accuracy of Bonjorno's testimony. *Id.* at 115. Dr. Kuehn's testimony was found confused and confusing. "The total effect is that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained." *Id.* at 118. In sum, plaintiffs' evidence created a speculative verdict on damages. *Id.* at 117. Because the damages and liability issues were not inextricably interwoven, and there was no indication that the jury verdict was the result of compromise on the liability and damage questions, retrial on damages only was ordered. *Id.* at 119.

The parties were requested to state their positions on procedure for a fair retrial on damages. Defendants had conceded at the argument on post-trial motions following the first trial that the court had the power to retry on damages only, but after the new trial on damages was granted, defendants argued that it would violate their constitutional right to trial by jury. However, counsel for defendants actively participated in discussions on the damage trial procedure.

At the outset of the damage trial, the court informed the jury of their duties. Because a jury in an antitrust matter must award only those damages that flow from the antitrust injury, *see*, 518 F. Supp. at 109, the opening statement was designed to acquaint the jurors with the nature of the antitrust violations that had been found. The jurors were told the parties, the businesses they were or are engaged in, the product and geographic markets involved, the antitrust laws the prior jury had found

violated, the purpose of those laws, and the types of liability evidence presented at the prior trial. Finally, the liability interrogatories and answers of the prior jury (518 F. Supp. at 119, App. A) were read to the damage jury. (N.T. 20-25).

Upon the conclusion of this opening statement, counsel for plaintiffs made opening remarks not only on the evidence to be presented by plaintiffs during the retrial but also the liability evidence that had been presented during the prior trial. To provide the jury with an understanding of the activities that gave rise to liability, plaintiffs' counsel was permitted to list the types of activities by KACC and KACSI relied on by plaintiff to establish liability at the first trial: that defendants refused to sell raw materials to Columbia; located a new culvert manufacturing plant within forty miles of Columbia's plant to retaliate against Columbia for buying materials from another supplier; set up Kennedy, the former Columbia salesman, to compete with Columbia; instituted a "price squeeze," in which Kaiser raised the price of the aluminum needed to fabricate culvert but sold fabricated culvert at a constant price; and induced Columbia to buy a machine suitable for use only with Kaiser products unless modified at significant expense. (N.T. 32-41). Counsel for defendants responded to plaintiffs' statement on liability in his opening remarks. (N.T. 53-56).

The jury, answering four special interrogatories on damages (attached hereto as Appendix A), awarded plaintiffs $728,000 for actual losses, $742,520 for lost profits on the sale of aluminum culvert pipe, $80,000 for lost profits on the sale of flat corrugated aluminum sheet, and $1,638,793 for the diminution in the value of the business. Judgment in the trebled amount of $9,567,939 was entered on this special verdict. Kaiser defendants have again filed post-trial motions. Judgment notwithstanding the verdict is sought on the grounds that: the retrial on damages was improper because the jury was unable to award damages flowing only from the antitrust injury; damages awarded for lost profits duplicated damages for actual losses (Int. 2); the profit projections were unsupported by evidence and artificially enhanced by plaintiffs' use of an improper geographic area and understatement of certain expenses; and the plaintiffs' contentions in the

trial on damages contradicted their contentions on the price squeeze in the trial on liability. Defendants also contest the period for which an award of damages on actual losses and lost profits was permitted. Defendants claim that damages awarded for lost profits from the intended sale of flat corrugated sheet (Int. 3) were speculative. Defendants claim also that allowing damages for loss of the value of a going concern (Int. 4) was improper because Columbia did not prove it ever actually terminated business during the damage period. Defendants contend that in any event the damage for loss of going concern value was overstated and was based on assumptions not supported by the evidence.

Defendants move in the alternative for a new trial on the grounds that the retrial on damages only was improper and prejudicial; the conduct of plaintiff's counsel was inflammatory; the court erred in its evidentiary rulings, charge and form of special verdict; and finally that the amount of the verdict was grossly excessive, shocking to the conscience, and the product of jury bias against defendants. Defendants' alternative motion for a new trial on damages only is denied. Defendants' motion for judgment notwithstanding the verdict is denied with regard to damages awarded in response to Interrogatories 1, 2 and 3 and granted as to damages awarded in response to Interrogatory 4. As a result, the jury's award is reduced by $1,638,793 (Int. 4) and the award remaining is in the total amount of $1,550,520. Therefore, when trebled, plaintiffs are entitled to entry of judgment in the amount of $4,651,560.

RETRIAL ON DAMAGES ONLY

KACC and KACSI (hereinafter referred to collectively as "Kaiser") object to the retrial on damages only ordered by the court on June 13, 1981 upon granting in part its motion for new trial. Kaiser contends that becuase it did not hear the evidence on liability, the damage jury was unable to determine which, if any, of the losses that Columbia suffered were actually caused by the antitrust violation. That such causation was required is clear. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477,

489 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type . . . that flows from that which makes defendants' acts unlawful . . .". However, the retrial procedure utilized did not in and of itself preclude rational jury determination of damages caused by the antitrust violations found by the previous jury.[1]

> The Third Circuit has expressly approved the use of a retrial on antitrust damages in *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); other cases in the Third Circuit are collected in plaintiffs' brief at Appendix C.[2] In that case the Court of Appeals found legal error in plaintiff's calculations of damages and remanded to the district court for a new trial on damages only. 531 F.2d at 107-09. We cannot presume that the Court of Appeals ordered a procedure that was *per se* violative of the rights of antitrust defendants. *Pueblo, supra* was decided after *Pitchford, supra*, but it was not the first case to hold that damages must be caused by defendant's antitrust violations and it may be assumed that the Court of Appeals was cognizant of a causation requirement when *Pitchford* was decided. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), for example, decided years before the remand for a damage trial in *Pitchford*, referred explicitly to the "necessary causal relation between the [violator's] conduct and the claimed damages. . . ." *Zenith, supra* at 125.

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1. In his opening statement, Kaiser's counsel "assured" the jury that Kaiser did not violate the antitrust laws or "any other law" notwithstanding the prior jury's determination of liability. (N.T. 52). Kaiser continues to object to the prior jury's determination of liability. Indeed, Kaiser seemed to protest the very mention of the previous liability verdict to the damage jury. (Defendants' Brief at 22). Of course, informing the damage jury of the prior determination of liability was a necessary first step in a retrial on damages to ensure that the damages, if any were found, flow from the antitrust violations. The court made strenuous, although not altogether successful, efforts to limit reference to the issues resolved at the liability phase to the bare minimum required for the jury to understand and determine the damage issues. (Defendants' Brief, 18-60; Plaintiffs' Brief, 26-54).

2. It has only recently been reported that the Court of Appeals for the Seventh Circuit has awarded a new trial on damages only in the MCI-AT&T antitrust litigation. *Philadelphia Inquirer*, January 13, 1983.

Defendants never requested that special interrogatories as to the alleged anticompetitive acts complained of by plaintiffs be submitted to the liability jury. (Defendants' Brief at 14-15, 23-24). Kaiser claims that the damage jury could not know which of the five alleged anticompetitive practices complained of by plaintiffs were actually relied upon by the jury that found it liable. But plaintiffs' economist did not attempt to and did not have to distinguish between actual losses caused by the various types of anticompetitive practices. Whether plaintiffs' losses were caused by one or more of the anticompetitive acts was immaterial on the damages issue so long as the jury was presented with competent evidence to prove the extent of plaintiffs' losses caused by Kaiser's impairment of the free and open market in aluminum culvert pipe. Plaintiffs' evidence was so directed. (*See, e.g.*, N.T. 509, 542, 548, 596). The charge to the jury made clear that the jury could only award damages for injury caused by Kaiser's conduct in the market:

> You are not to presume just because Columbia suffered financial losses or went out of business that all such losses are caused by Kaiser. The plaintiff, as I said, must prove those financial losses are setbacks that were caused by Kaiser and establish some reasonable basis in the evidence for the damages that you find.
>
> Similarly it follows from that that you should not award plaintiffs damages for losses caused not by Kaiser but by conditions in the economy in general or a recession in the construction industry, aluminum, shortage, a lack of price protection for long-term requirement contracts.
>
> You may also consider whether or not plaintiffs' calculations should have taken into account poor business judgment or poor management. Some corporations suffer losses solely because of their own inadequate financial capitalization. You can't award plaintiffs damages for all its losses if you find that Columbia was under capitalized, that is that there was a lack of sufficient working capital and that losses were suffered as a result of that, because under such

circumstances Columbia's financial inadequacies rather than Kaiser's conduct would have caused some portion of the losses.

(N.T. 1531-32).

Even if there were a serious question raised as to the propriety of a new trial on damages only, defendants waived objection to this procedure. Before issuing the June 17, 1981 Order granting the retrial, defendants spoke in favor of the concept. Addressing the court's question during supplemental oral argument on the post-trial motions on December 29, 1980, counsel for Kaiser stated:

> . . . with respect to the grant of a new trial with respect to damages alone, obviously, in our submission, the cases would support that kind of remedy.
>
> As to the mechanics upon the new trial, it seems to me, Your Honor, that there would, of necessity, simply be more to the trial than a review of the charts, testimony of Dr. Kuehn, or whomever the plaintiff wished to put on as a fact witness or expert witness. It seems to me there are additional matters relevant to damages and the amount of damages which also go to questions of causation. Those as we have addressed in our post-trial briefs, deal with conditions in the marketplace that may have impacted upon Columbia's volume of sales, and hence on the amount of profit that it would have earned even assuming the existence of violations of the antitrust laws by Kaiser which also impacted upon Columbia . . . .
>
> With respect to liability, I believe that it would be sufficient to inform the jury that a verdict on liability has been established; that a jury has found that that violation of the antitrust laws caused some damage to Columbia, and it would be up to the jury to determine what the extent and amount of that damage was, and I believe that a trial could occur.

Docket Entry No. 510, N.T. 406. Defendants, having supported a new trial on damages before the jury's award at such trial was

known, should not be permitted to object to the procedure itself just because its outcome is not to their liking.

But even if defendants are correct that a limited retrial on the issue of the amount of damages was so prejudicial to Kaiser as to constitute reversible error, the remedy can certainly not be a judgment notwithstanding the verdict in favor of defendants; at most defendants are entitled to a retrial on both liability and damages. That remedy does not lie with this court at this time. Following a bifurcated trial on liability and damages on remand from the Court of Appeals, this court denied a motion for a judgment notwithstanding the verdict on liability; judgment notwithstanding the verdict was granted as to one item of damage in the amount of $157,000 and a new trial granted as to the award of damages for lost profits ($1,048,000) and destruction of Columbia as a going concern ($710,000). But, that new trial was as to damages only for the reasons stated in the court's Opinion of June 18, 1981. At this juncture, the power of this court is limited to granting a new trial again on damages only. This was called to the attention of counsel frequently in the course of the trial in trying to assure fair procedures and prevent yet another retrial. (N.T. 97-99; 976-978). Therefore, the court concludes that defendants' objections to a limited retrial on damages are only to preserve them for the Court of Appeals which, of course, has the power to order a new trial on liability and/or damages.

JUDGMENT NOTWITHSTANDING THE VERDICT

The standard in this Circuit for the entry of judgment notwithstanding the verdict is clear. The court must interpret the evidence in the light most favorable to the verdict winner, and may grant the motion only if that evidence and the reasonable inferences to be drawn therefrom fail to support the verdict as a matter of law. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970). *See also, Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1098-99 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Kademenos v. Equitable Life Assurance Society*, 513

F.2d 1073, 1974 (3d Cir. 1975); 6A *Moore's Federal Practice* §59.08[5] at 59-152 (1979). A directed verdict may be entered on only one or a combination of jury findings if a special verdict has been returned in accordance with Fed.R.Civ.P. 49(a). *See, Franklin Music Co. v. American Broadcasting Cos., Inc., et al,* 616 F.2d 528 (3d Cir. 1979); *Fox v. Kane-Miller Corp.,* 398 F. Supp. 609, 649 (D.Md. 1975), *aff'd,* 542 F.2d 915 (4th Cir. 1976).

Defendants concede this standard but contend that the court should enter judgment n.o.v. because the verdict is contrary to the evidence and unsupported in the record; that is, there is but one reasonable conclusion as to the proper judgment. Defendants agrue this persuasively and well. Defendants' brief makes an excellent closing speech to the jury; the problem is that the jury heard it and nonetheless decided for plaintiffs. With the exception of damages for loss of value of a going concern discussed below, there is no error of law during the trial or in the court's charge to the jury on damages (N.T. 554) that would justify setting aside that verdict. The charge was fair and clear although relatively brief because it commented little on the evidence argued in detail by able counsel for both sides. But it touched on and left to the jury all but one of the matters of which defendants now complain in asserting a right to judgment notwithstanding the verdict.

The Supreme Court stated in *Zenith, supra:*

> Trial and appellate courts alike must also observe the practical limits of the burden of proof, which may be demanded of a treble damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

395 U.S. at 123. Accordingly, in an antitrust case, damages need not be proven with exactness or precision; rather, "the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264 (1946). The court does not have the prerogative of drawing

inferences from facts within the exclusive province of the jury that are contrary to its findings without usurping the functions of the jury as a fact finding body. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 566 (1931). It was for the jury to determine the weight of the evidence and the credit to be given the witnesses, expert or otherwise; it has given its verdict accordingly. To set this verdict aside except for clear error of law would impermissibly intrude on the role of the jury in an antitrust trial.

DUPLICATION OF ACTUAL LOSSES AND LOST PROFITS

Kaiser contends that the award for hypothetical lost profits (Int. 2) duplicates the award for actual losses (Int. 1). Kaiser argues that these two types of losses are "irreconcilably contradictory and mutually exclusive." (Defendants' Brief at 64). *See, William Goldman Theatres, Inc. v. Loew's, Inc.,* 69 F. Supp. 103, 105 (E.D.Pa. 1946) *aff'd,* 164 F.2d 1021 (3d Cir.), *cert. denied,* 334 U.S. 811 (1948). In *William Goldman Theatres,* the plaintiff was unable to obtain first-run movies for his leased theater because of defendants' conspiracy to restrain trade. 150 F.2d 738, 742 (3d Cir. 1945). The district court declined to award out-of-pocket expenses actually incurred by plaintiff in connection with an alternative use of the premises in addition to the lost profits from the hypothetical operation of the business from which plaintiff was excluded by defendant's conduct. 69 F. Supp. at 105. Plaintiff's actual losses from the ineffective effort to mitigate damages were not causally connected with the losses from the intended use for which antitrust damages were awarded. *See,* 69 F. Supp. at 105.

However, Columbia was in business throughout the damage period as a culvert fabricator and distributor. To the extent it would have made profits in a free and open market, the antitrust laws provide compensation. Columbia incurred actual losses while running the business it contended it would have operated profitably but for the illegal conduct of the defendants. Plaintiffs' damages would have been reduced had Columbia

actually made a profit during the damages period, and so plaintiffs may recover the net losses that were actually incurred in addition to the profits they would have made. Had Columbia made a profit, that sum would have been subtracted from hypothetical lost profits to arrive at the true measure of harm to Columbia. *Pitchford, supra* at 109. But plaintiffs suffered a loss rather than a profit and are entitled to subtract this negative figure from the hypothetical lost profits proved. *(See,* N.T. 55-56). The resulting calculation, the addition of actual losses to lost profits, is necessary to make plaintiffs whole.

LOST PROFITS ON ALUMINUM CULVERT PIPE

Plaintiffs utilized a market share theory to calculate their hypothetical lost profits during the damage period. Plaintiffs' expert economist, Dr. Gary Bowman, calculated the amount of aluminum culvert pipe actually sold in the relevant market and then calculated the proportion of sales Columbia would have made absent an antitrust violation. He sought to establish the number of pounds of culvert Columbia would have sold in a free and open market and multiplied that number by the estimated revenues Columbia would have received per pound. From this estimate of gross revenues he subtracted his estimate of Columbia's total expenses if there had been a free and open market. This type of analysis is proper in a case in which plaintiffs were deprived from competing freely in a particular product and geographic market, and the injured party need not produce the "kind of concrete, detailed proof of injury which is available in other contexts." *Zenith, supra* at 116, 123-35.

An expert opinion on relevant damages issues is not enought to satisfy the plaintiffs' burden on damages unless that opinion is based on relevant data and the assumptions behind the opinion are shown to be realistic so that the jury has a rational basis for its decision. *In re IBM Peripheral EDP Devices Antitrust Litigation,* 481 F. Supp. 965, 1012, 1020 (N.D.Calif. 1979). Plaintiffs presented expert testimony on all elements of the market share theory, their estimates of the size of the local market issue, Columbia's share of the local and non-local

markets assuming free and open competition, and Columbia's expenses in a free and open market; therefore, the record did not force the jury to engage in impermissible speculation.

Defendants argue that the jury's award of plaintiffs' claims for lost profits must be set aside because plaintiffs' projection of lost profits on the sale of aluminum culvert pipe is based upon assumptions unsupported and contradicted by the evidence in that:

a. the volume of sales in the so-called "local area" are deliberately overstated, contrary to the evidence in the record;

b. plaintiffs' proof on damages improperly deviated from the stipulated relevant geographic market; and

c. plaintiffs' projections of profits on the sale of aluminum culvert pipe were artifically and improperly enhanced by understating certain expenses.

The first step in estimating what a defunct business would have sold in a free and open market was to estimate the overall volume of the market. Plaintiffs' expert chose to use two geographic markets: local and non-local. The local, or "Vineland," selling market was the area covered by the approximately 150-mile radius surrounding Vineland, New Jersey, the location of Columbia's plant. The non-local market was the remainder of the geographic market for which plaintiffs seek damages. Plaintiff's stated rationale for using two markets was that Columbia would have commanded a significantly greater proportion of sales in the local rather than non-local area—50% rather than 30%.

Thus, if plaintiffs' estimate of the number of pounds sold in the local market was too high because it took into account pounds that were sold in the non-local market, the figure for the total number of pounds of pipe sold by Columbia would be inflated, since the local poundage is multiplied by .5 but the non-local by .3. It is plaintiffs' burden to put into evidence a reasonable and rational estimate of the size of the market. *Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906,

911-12 (2d Cir.), *cert. denied,* 369 U.S. 865 (1962). Where conflicts as to credibility exist as to ceratin estimates, they are to be resolved by the jury.

Defendant points out that Dr. Bowman used figures for the so-called "local market" that included non-local sales although Dr. Bowman asserted to the contrary. (N.T. 609). Under cross-examination, Dr. Bowman stated that he obtained his estimate of local market sales by adding sales from Kaiser's New Castle, Delaware plant to Columbia's Vineland sales, This approximately 150-mile local sales area included all of New Jersey, Delaware, most of Maryland, approximately the eastern third of Pennsylvania and very small portions of Virginia, West Virginia, and New York. Ex. D-150 (Map of Eastern United States with 150-mile radius of Vineland delineated). Kaiser introduced uncontradicted deposition testimony that New Castle sales include sales from the entire state of "Virginia, West Virginia, Maryland, Delaware, New Jersey, Pennsylvania." (N.T. 886), Dr. Bowman used an "adjusted territory pounds" figure and then assumed that included only sales within the local area (N.T. 610); Kaiser argues the invalidity of that assumption. Kaiser's evidence tends to establish that significant sales were made outside the local area that Dr. Bowman considered the local market; Dr. Bowman admitted that if such were the case, his figures would have to be adjusted. (N.T. 611). Kaiser argues that because the jury had no basis upon which to adjust Dr. Bowman's inflated figures, Dr. Bowman's opinion on the total pounds of culvert sold by Columbia permitted the jury to speculate as to the total size of the market.

But Dr. Bowman told the jury he divided the entire market into two shares basically for two reasons: Columbia would have made more sales in an area closer to its plant, and Kaiser data from its New Castle and Schenectady plants was available. The local market focused on Kaiser sales areas and was not strictly speaking an area within a 150-mile radius of Vineland, New Jersey as defendants contended. Since Kaiser was the dominant selling force in the total market, Kaiser sold most of the aluminum culvert pipe, and the Kaiser data provided a natural factual basis for the computation of the market. On plaintiffs'

proof of its damages from Kaiser's violation of antitrust laws, Kaiser does not have standing to complain about its data not providing a precise "geographical fit" to the relevant geographical market in this case.

Q. Why did you pick those two areas? Why did you make that division?

A. Generally speaking the reason for making any division if you divide an overall market area into subareas you get a somewhat more accurate projection. That is the share of the market Columbia would have had in the near areas is bigger than it would have had in the further away area. The reason I chose those two areas is that that is the way Kaiser's statistics were broken down. It was convenient. They had figures for sales to what they called the New Castle area, and they had sales outside of that that I called sort of loosely the non-local area which also may be called the Schenectady area. Since I couldn't breakdown Kaiser's figures any other way and I had Mr. Bonjorno available to tell me how his sales broke down between the two areas as defined by Kaiser it was convenient to use those two breakdowns rather than a breakdown of the overall market into two submarkets.

Q. Once you had decided to make that breakdown, what was the first thing you then did with the data you had available?

A. Once I had the breakdown I wanted to see what kind of market share each of the companies would have had, specifically what market share Columbia would have had over the period '74 through '77.

Q. Did you attempt to determine what volume had actually been sold in each of those areas?

A. Yes, I did. I described that earlier. I'm sorry, that is clearly the first step. You have to know how much was sold in each of the areas over the period.

(N.T. 305-6, Dr. Bowman).

Plaintiffs contend that, even if their estimate of total pounds sold in the local market was inflated by overstatement of the size of the market, Kaiser could have introduced its own data demonstrating the size of the local market. (Plaintiffs' Brief at 69). Defendants chose instead to attack the credibility of plaintiffs' evidence at trial and its adequacy post trial. But once the jury has determined the credibility issues adversely to defendants only the issue of adequacy remains and the standard of proving damages is liberal. *Bigelow, supra.* That standard has been met if plaintiffs' expert is to be believed.

To determine the number of pounds of aluminum culvert pipe Columbia would have sold absent Kaiser's antitrust violations, Dr. Bowman multiplied the total poundage that would have been sold by all companies by his estimate of Columbia's share of the local and non-local markets. If that estimate had no basis in fact, the resulting calculation had no basis in fact and the jury in considering it would have been speculating in arriving at its verdict on lost profits.

Dr. Bowman determined that in a free and open market Columbia would have almost only Kaiser as a competitor and that Columbia would have obtained 50% of the sales in the local market and 30% of the sales beyond the local market.

> Q. Now, why did you select fifty per cent—well, for the three years '75, '76 and '77, why did you use that specific figure [for the local area]?
>
> A. Basically because there were two competitors in the marketplace. Basically was Kaiser and Columbia, and basically they were equally situated.
>
> It is true that Columbia was developing its position, but fundamentally regarded them as equally situated competitors, and I think they would have shared the market equally.

(Examination of Dr. Bowman, N.T. 507). The credibility of Dr. Bowman's analysis of the relative strengths of Columbia and Kaiser absent antitrust violations was a question for the jury.

However, Dr. Bowman was obliged to demonstrate that he took other potential competitors into account in concluding that a fully competitive aluminum culvert market would be a duopoly. Under cross-examination Dr. Bowman asserted that he took such other firms into account but considered their influence negligible.[3]

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3. After stating there were two "major" sellers, he was asked about a third company:

> Q. So there was a third company. Is it also known as Lane Metal Products?
>
> A. Yes, I had forgotten--
>
> Q. This is a company that is a subsidiary of Bethlehem Steel?
>
> A. Yes, I understand it is.
>
> Q. So you found a third company, Lane, in the local area, selling aluminum pipe in the local area?
>
> A. Yes, that's correct.
>
> * * * * * *
>
> Q. Why didn't you take Lane into account when you were estimating 50 per cent in the local area?
>
> A. Because Lane was only a very small factor in that market, more negligible.
>
> Q. You mean in reality, they were a small factor? You tried to determine how many pounds they sold or something and you determined they didn't sell many pounds?
>
> A. No. They would have been a small factor. I was making projections of what Columbia would have done in free and open competition.
>
> Q. I am talking about Lane, not Columbia.
>
> A. I thought you were asking about Columbia's 50 per cent share of this sub-area, the local area, and that is what I was attempting to respond to.
>
> Q. What I am trying to determine is did you take into account whether Lane would have any market share in this local market?
>
> A. I took that into account, yes. I considered them as a possibility, certainly.

At the trial Kaiser vigorously attacked Dr. Bowman's assumption that Columbia could have had 50% of the sales in the local area and 30% of the non-local sales. Defendants' witnesses were allowed to testify about possible competitors of Columbia and the entry into the aluminum culvert market of steel culvert producers. Kaiser's expert contested Columbia's alleged share of the market and testified to the fallacies of Dr. Bowman's analyses. Problems in comparing Kaiser's calendar year figures and Columbia's fiscal year figures were also developed at length. Dr. Bowman placed before the jury a market share estimate of his view of Columbia's position in an open market. Since it had some support in the evidence, Dr. Bowman's evaluation of the non-local market and his disregard of competitors was for the jury to consider and evaluate.

NOTES *(Continued)*

Q. Well, did you try to estimate what share they would have gotten?

A. I--yes.

Q. What did you come up with?

A. My analysis suggests that the share they would have gotten would have been very small, essentially negligible.

Q. Essentially negligible?

A. Yes.

Q. [N]either Lane nor Columbia in the non-local--local area were much of a factor, yet you gave Columbia 50% of business and you gave Lane one or 2%. Why is that?

A. Because of the position that Columbia was in, with the facilities they had, production facilities, the ability to produce, the kind of equipment they had, the marketing strategy, the product line they offered, the expertise, the kind of connections they had in the business. They were doing fairly well in '73. As a matter of fact, they had 38% of that local area in 1973.

Q. Did you make any analysis--similar analysis of Lane Metal Product as a subsidiary of Bethlehem Steel to see if they had the ability to market in this area under your projections?

A. I didn't do a specific detailed study of Lane, no, I did not.

(Cross-examination of Dr. Bowman, N.T. 613, 614-15, 617).

After Dr. Bowman estimated how much pipe Columbia would have sold in unrestrained local and non-local markets, he multiplied these figures by the estimated selling price for each pound of pipe to ascertain Columbia's gross revenues. The next and final step in estimating the lost profits was to deduct Columbia's estimated expenses in a market free of Kaiser's antitrust violations.

Defendants contend several aspects of Bowman's projected expenses are unrealistically low. But to the extent Dr. Bowman's estimates were supported by some evidence on the record, we cannot state that the jury had no basis upon which to base its evaluation. Dr. Bowman arrived at a figure for Columbia's hypothetical interest expense that was quite low. The actual rate at which Columbia was able to borrow during the damage period was 3.75% above the prime rate. This money was obtained from Columbia's sole banking lender, the Philadelphia National Bank. Dr. Bowman found the average prime rate during the damage period to be approximately 8% (N.T. 559). Instead of using the average percentage of 11.75%--prime plus 3.75%--for Columbia's borrowing costs, Dr. Bowman estimated that in a free and open market Columbia's interest rate would have been 9.5%, the 1975 BAA bond rate. (N.T. 559).

Dr. Bowman admitted that companies of Columbia's size "would not generally borrow with bonds; that is, they tend to borrow directly from a bank instead of a bond." (N.T. 559). But there was testimony from the PNB bank officer for the Columbia account, that had Columbia not been injured by Kaiser's anticompetitive acts it would have been able to borrow funds more cheaply (N.T. 1310); the jury was informed that this bank would recover its unpaid loans (in excess of $320,000) from any award to plaintiffs. But the basis for Dr. Bowman's hypothetical interest rate was not "thin air." *In re IBM, supra* at 1019. There is no justification for entering a judgment notwithstanding the verdict on lost profits on the sale of aluminum culvert pipe.

LOST PROFITS ON CORRUGATED ALUMINUM SHEET

Columbia's business was fabricating culvert pipe. Although it never actually engaged in any other business, plaintiffs contend that Columbia was ready and willing to begin fabricating flat aluminum sheet, the product from which other fabricators make riveted rather than spiral pipe, and would have been able to do so but for Kaiser's antitrust violations. Therefore, plaintiffs sought, and the jury awarded, hypothetical lost profits on the sale of corrugated sheet. There was evidence that production facilities were modified to manufacture corrugated sheet during 1974, and Bonjorno estimated he could have sold 750,000 pounds of corrugated culvert sheet in 1975, 1-½ million pounds in 1976, and 2-½ million pounds in 1977. (N.T. 205).

To allow the award of lost profits for a business that was never actually in operation, the court must first decide whether plaintiffs' entry into such line of business would have been a natural outgrowth of an established business or an expansion into a new market. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 988 n.20 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). Relevant considerations include the "history of the expansion and growth patterns of other competitors in the relevant market," whether production facilities have to be varied significantly, and whether "customers for one unit would in all likelihood remain customers for other units." *Id.* Plaintiffs presented no direct evidence that the production of flat sheet was a natural outgrowth of pipe fabrication, but there was some evidence, if believed, that Columbia would have had other fabricators as sheet customers even though the customers for pipe would be direct users. There was evidence not only that the production facilities could be readily modified but that Columbia had so modified them and was equipped to manufacture and supply corrugated tube sheets after 1974 (N.T. 201-5). Therefore, the production of corrugated sheet could have been a natural outgrowth of Columbia's culvert business.

The court's second step is to determine whether plaintiffs presented sufficient evidence to allow the jury to determine that plaintiffs had an intention to enter the business and were

prepared to do so. *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). There is much evidence if credited that plaintiffs had the requisite intention, but the record is not as clear that they were so prepared. The Fifth Circuit has listed four elements of preparedness: (1) the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; (2) the consummation of contracts by the plaintiff; (3) affirmative action by the plaintiff to enter the business; and (4) the background and experience of plaintiff in the prospective business. *Id., quoting Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

Plaintiffs were unable to finance the purchase of the raw material (aluminum coil) needed to manufacture the corrugated sheet. (N.T. 202). Mr. Bonjorno claimed this was because prices of the finished pipe had been so depressed by Kaiser that it was not economically profitable for customers to buy corrugated sheet, make it into riveted pipe and sell it at a competitive price. (N.T. 186, 202). Bonjorno's assertion that the price of finished pipe was depressed by Kaiser was contradicted by other evidence presented by plaintiffs at trial.

Dr. Bowman testified that in a free and open market the selling price of pipe can be broken down as: 65% for aluminum costs, 25% for other production costs, and 10% for profits (N.T. 537). Taking the cost of aluminum obtained from Alcoa's price lists published during the relevant years (N.T. 538), Dr. Bowman calculated the hypothetical unrestrained selling price of pipe. In Dr. Bowman's words, Kaiser's prices were "substantially the same" as those projected for a free and open market. (N.T. 1480). But the credibility of Bonjorno's explanation for Columbia's inability to enter the corrugated sheet market, whether he might have consummated a contract with Alcoa or sold corrugated sheet to Syracuse Tank, Lane Pipe or others and Columbia's readiness to enter the corrugated sheet business were all for the jury not the judge to assess.

GOING CONCERN VALUE

Defendants argue that plaintiffs cannot recover damages for loss of Columbia's value as a going concern because Columbia had not "terminated its business . . . as a consequence of an antitrust violation by Kaiser." (Defendant's Brief at 105). We agree.

A business that is forced to shut down because of antitrust violations is entitled to damages for loss of going concern value if proved. VonKalinowski, 15 *Antitrust Laws and Trade Regulation* §115.03[4] (1978) (citing cases). This was recognized in our Opinion of June 17, 1981 which rejected an argument that the da.nages awarded were duplicative. The Opinion recognized that losses for past net profits and reduction in the value of a business are not duplicative absent unique circumstances. Defendants argued that plaintiffs' recovery of lost past profits and their receipt of $574,000 from the sale of Columbia's assets to Howmet Aluminum Corporation ("Howmet") necessarily fully compensated them. But the value of the business as a going concern might have exceeded the amount received from Howmet at the time of sale were it not for the anticompetitive conduct of the defendants. Therefore, an award of damages for loss of value as a going concern was held non-duplicative of actual losses or projected losses from 1974 to 1977 and non-duplicative of the money received from the sale of Columbia's assets to Howmet, so long as the damage award for going concern value was properly adjusted to reflect only goodwill, that is, the discounted present value of the estimated flow of future earnings.

However, that opinion was based on the erroneous impression that the sale of Columbia's assets to Howmet was in May, 1977 the end of the damage period. At that time we did not have the argument on the correct facts more fully developed on the present record: that Columbia was a going concern in May, 1977. Significant intervening factors interrupted the causal connection between plaintiffs' antitrust violations and the going concern value of Columbia as of December 20, 1978 so that it would have been improper to allow recovery for loss of profits as

a going concern on that date. To the extent that we stated plaintiffs were entitled to both the lost past profits as of the time of the sale to Howmet (December 20, 1978) and the loss of value of the business as it would have been absent defendants' violation of law in May of 1977, we were in error because it is now clear that Columbia's business had not been terminated as of that date losses were allowed for its termination or destruction.

For recovery of "going concern" damages as well as any antitrust damages, it is well established that a plaintiff cannot prevail merely by proof that the defendant has violated the antitrust laws. He must prove that the violation had a causal relationship to the particular loss of anticipated revenue, that is, that the particular damage to plaintiff flowed from the conduct of the plaintiff. *Rea v. Ford Motor Company,* 497 F.2d 577 (3d Cir. 1974), *cert. denied,* 419 U.S. 868 (1979). *See also, Freedman v. Philadelphia Terminals Auction Co.,* 301 F.2d 830, 833 (3d. Cir.), *cert. denied,* 371 U.S. 829 (1962). Going concern damage is designed to compensate for the harm sustained when a business interest is unlawfully terminated as a result of an antitrust violation. Schneider, *Damages for Termination of a Business Interest,* 49 Antitrust L.J. 1295 (1980).

Antitrust cases concerning "going concern" or "goodwill" damages assume destruction, forced sale or other termination of the business as a necessary predicate to recovery. *Eiberger v. Sony Corp. of America,* 622 F.2d 1068 (2d Cir. 1980) (termination of office equipment dealership); *Pitchford, supra* (termination of scientific instruments dealership contract); *Albrecht v. Herald Company,* 452 F.2d 124 (8th Cir. 1971) (forced sale of newspaper carrier's route); *Lessig v. Tidewater Oil Co.,* 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964) (termination of service station lease and dealer contract); *Osborn v. Sinclair Refining Co.,* 324 F.2d 566 (4th Cir. 1963) (cancellation of service station lease and lessee's dealer sales arrangement); *Twentieth Century Fox-Film Corp. v. Brookside Theater Corp.,* 194 F.2d 846 (8th Cir.), *cert. denied* 343 U.S. 942 (1952) (forced sale of 15-year lease on motion picture theater).

The calculation of going concern value is made as of the date the plaintiff's business was terminated or sold as a result of the illegal conduct. *Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 455 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970). As stated in *Farmington, supra*, "going concern" represents "the value which the business would have had at that time but for [the defendant's] illegal activity." 421 F.2d at 81. Accordingly, not only must there be a sale or cessation of the business but the date must be at the end of the damage period.

Plaintiffs operated their business as a going concern for approximately five months after May 31, 1977.[4] but plaintiffs elected May 31, 1977 as the end of the damage period. A government loan of $600,000 on or about that date permitted Columbia to continue in operation:

> Q. Now you said that the end of the damage period for which you are seeking damages is May--is what, I'm sorry.
>
> A. May 31, 1977.
>
> Q. Why did you pick that as the end of the damage period?
>
> A. It was just about that time or shortly thereafter that we received the proceeds of the EVA [sic EDA] loan, and the metal that the proceeds permitted us to purchase. Had it not been for that loan we would have then had to close our doors once and for all, and we felt that that represented a conservative and fair place to end the damages.

(N.T. 167).

Thereafter, plaintiffs, supplied with aluminum by Alcoa, operated their business as a going concern. Plaintiffs sold Columbia on December 20, 1978, over a year after May 31, 1977, the date plaintiffs concede to be the end of the damage period The proceeds of a loan of $600,000 plaintiffs received from the Economic Development Administration of the United States Department of Commerce were used in the manufacture of steel and aluminum pipe:

> Q. And after it got the $600,000, Columbia went back into operation, did it not?
>
> A. Yes, it did.
>
> Q. And during that time it made aluminum and steel pipe, did it not? . . .
>
> A. We made some small quantity. We tried to make some small quantity of steel pipe, yes.
>
> Q. And you made aluminum pipe?
>
> A. Yes, we did.
>
> Q. What company supplied you with aluminum?
>
> A. Alcoa.
>
> Q. How long was Columbia in operation after it got the $600,000?
>
> A. Approximately five months.
>
> Q. And you stopped production again?
>
> A. Yes.

(N.T. 296-7).

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4. Although Columbia suspended its production, it never ceased doing business altogether prior to May 31, 1977:

> Q. Was Columbia Metal open and in business until at least May 31, 1977?
>
> A. Yes, we were.
>
> Q. Had you ever closed your doors?
>
> A. No, we never had.

(N.T. 150—Bonjorno).

Although the jury could reasonably have used May 31, 1977 as the end of the damage period for purposes of calculating lost profits, it could not as a matter of law apply this date as the commencement of "going concern" damages. May, 1977 was not the time of business termination but rather the time of its rejuvenation. By the time Howmet purchased Columbia the following year and began to reoperate as Howmet Columbia (N.T. 756-57), the going concern value of the company was substantially altered by the receipt of the government loan and numerous other market forces during the period of operation and thereafter.

With respect to going concern damages, the loan of substantial government funds in May, 1977 is not simply another factor to be accounted for by the jury in its overall assessment of the amount of damages due. The $600,000 EDA loan made it possible for Columbia to continue in operation as a going concern. For although Columbia ceased its production in 1975, it "kept its doors open" and renewed production in 1977 *as a result of the EDA loan.* (N.T. 167-69). A business which is in operation, as was Columbia in May, 1977, cannot receive damages for loss of profits it would have had as a going concern. Loss of going concern value is for a concern no longer going, that is, terminated by liquidation or forced sale.

Plaintiffs filed this action in January, 1974; at trial they chose May, 1977 as the conclusion of the damage period; they foreclosed their ability to reccover damages for the time they continued to operate with government financing. The cessation of their operations five months thereafter and sale of the assets of a defunct operation one year after that cannot be attributed to Kaiser on this record. If the jury were to go beyond the damage period to the actual date of sale, charge Kaiser with responsibility for the sale and then assess going concern damages flowing from defendants' activities as of December, 1978, the jury would be forced to rely on prohibited speculations and guesswork.

> If . . . the record discloses that the evidence on which the verdict is based is so critically deficient of proof of an essential fact needed to support the verdict that the jury could only have ventured a guess as to its occurrence, then a judgment notwithstanding the verdict is required.

Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1099 (3d Cir. 1980) *citing Denneny v. Spegel,* 407 F.2d 433, 442 (3d Cir. 1969) and *Neville, supra* at 1210 n.5.

The uncontested testimony of the plaintiffs that the EDA loan made possible the continued operation of the business beyond the damage period barred recovery for future loss of profits as a going concern as a matter of law even if the record is viewed in the light most favorable to plaintiffs. Therefore judgment for defendants notwithstanding the verdict will be entered as to the damages awarded in Interrogatory 4. We find it neither necessary nor appropriate to grant a new trial because of this issue. A new trial could not change the result as to these damages; the evidence as to the other items of damages and its consideration by the jury was sufficiently distinct to permit their award even if the damages for loss of going concern value is set aside.

Defendants assert several other grounds for the deficiency of the evidence on going concern value, including that the capitalization of profits should have been on a pre-tax instead of after-tax basis and that the use of a 10% capitalization rate was too high for a company such as Columbia. Defendants argue these points persuasively but upon evidence not offered at trial or the proper subject of judical notice at this time; without such evidence on the record it is inappropriate for the court to consider it in the context of post-trial motions. In any event, these matters are moot in light of our denial of going concern damages on other grounds.

OTHER GROUNDS FOR JUDGMENT N.O.V.

Three other contentions of defendants in support of judgment in their favor notwithstanding the jury verdict for plaintiffs merit discussion.

Defendants objected to the admission of evidence on lost profits on sales beyond the relevant geographic area as stipulated by the parties.[5] The evidence of non-local sales which was the basis of plaintiffs' projections undeniably extended beyond the geographic area agreed to by the parties for the purpose of determining liability. But it was not agreed to as a limitation on plaintiffs' damage estimates. As long as there was some evidence that Columbia would have made sales beyond that geographic area, as there was, plaintiffs were entitled to have the jury consider those estimated sales. *Pitchford, supra* at 108-09.

Defendants contend that whatever the actual losses or lost profits, for all practical purposes, Columbia's business was terminated prior to 1977 so that damages could not in any event be awarded beyond 1975. This issue was vigorously pursued on examination and cross-examination of witnesses for both sides and argued to the jury thereafter. The jury was instructed to award damages only for those years during which it was reasonable for Columbia to have continued to operate its business for purposes other than the claim of damages in suit. (N.T. 1540-41). The jury had an adequate basis upon which to decide the length of time for which damages might be awarded to plaintiff.

Defendants also contend that the judgment should be set aside because plaintiffs' theory of damages and the evidence adduced to support it contradicted the theory of liability based upon a "price squeeze." Among the joint activities of defendants relied on by plaintiffs at the trial on liability was a "price squeeze" by which KACC raised the price of aluminum sheet sold to other fabricators; aluminum sheet was transferred to KACSI at a price that permitted KACSI to sell Kaiser fabricated culvert at a low price with which other fabricators could not complete. That is, the difference between the price of the raw material charged by Kaiser and others, such as Alcoa, presumed to follow its lead, and the price charged for the finished product by Kaiser made it impossible for other companies not vertically integrated to sell the finished product competitively.

5. The stipulated area extended north through Rhode Island, south through Northern Virginia, and west through eastern Pennsylvania.

In this trial on damages, the calculations of plaintiffs' expert on prices in a free and open market tended to contradict the "price squeeze" theory. The prices he used for raw material (aluminum coil) were the actual prices charged by Alcoa in 1974-77 at which time it allegedly followed the lead of Kaiser. He used these prices to establish a fair selling price in a freely competitive market; those prices were admittedly nearly identical to the average direct selling price actually charged by Kaiser in the damage period. (N.T. 1478-80). Plaintiffs' expert also testified that the relationship between metal cost and the selling price of culvert pipe in a free and open market would have been 65% of sales; Columbia's financial statements for the year 1970 through 1975 showed a raw material cost approximating 65% of sales in each year. Thus, plaintiffs' evidence at the retrial on damages cast some doubt on a "price squeeze" as the basis for liability.

But a "price squeeze" was just one of a number of activities relied upon by plaintiffs at the first trial from which liability might have been found. There was sufficient evidence from which a jury might have inferred that KACSI: attempted to drive Columbia out of business; threatened to place a plant near Columbia if it purchased raw material from other than Kaiser and then later opened a plant in Delaware that had originally been planned for Virginia; charged lower prices from that plant, particularly in southern New Jersey; and extended credit to a former salesman of Columbia against the recommendation of KACSI's credit department. A jury finding on the anticompetitive significance of each of these acts was not requested and no special interrogatories were submitted as to which of the alleged categories of activities violated the Sherman Act or caused antitrust injury to Columbia.

At the first trial plaintiffs estimated damages by using four projection Methods (Methods C, D, E, and F). Method C (P-3012) projected Columbia's sales based upon government figures on new housing starts and new highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while Method E (P-3014) used Kaiser sales from the new

Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendants' wrongdoing. At the time the post-trial motions were decided it did not appear liability and damage issues were inextricably interwoven. The trial on damages and liability had been bifurcated by agreement of the parties, so that there seemed little basis to believe the jury verdict would have been the result of compromise on the liability and damage issues. Because the liability and damage issues seemed sufficiently distinct and severable, a new trial on damages only was deemed fair to both parties and was so ordered. But *cf.*, *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981) (plaintiffs' failure to prove five of six alleged exclusionary activities and lack of certainty that jury based its verdict exclusively on the one remaining practice required all findings on liability set aside; a partial new trial limited to redetermination of damages held improper unless it clearly appeared the issue to be retried was distinct and separable).

Notwithstanding the vigor with which plaintiffs' urged the unassailability of their damage evidence on their motion for reconsideration (later withdrawn), at the damage retrial plaintiff proffered a different expert and a different method for calculation of Columbia's hypothetical share of a freely competitive market. This new testimony on damages if heard by the liability jury might have influenced it to reject or discount the contention of a "price squeeze" by the Kaiser defendants. But this circumstance certainly does not compel the entry of judgment in defendants' favor notwithstanding the verdict. At most it reflects the unforeseen difficulties arising from a limited retrial on damages. Since the court rules now only on post-trial motions concerning the retrial on damages, this consideration is for the Court of Appeals.

The court has considered all other arguments for the entry of judgment notwithstanding the verdict and found them to be without merit.

MOTION FOR NEW TRIAL

When a party moves for judgment notwithstanding the verdict or in the alternative for a new trial, and the court grants judgment notwithstanding the verdict, it is imperative that the court rule on the new trial request so that the litigation will not be needlessly protracted if the judgment is thereafter vacated or reversed by the appellate court. Fed.R.Civ.P. 50(c); 15 Wright & Miller, *Federal Practice and Procedure* §2539 (1971). Defendants advance four grounds for a new trial: that the conduct of plaintiffs' witnesses and counsel was prejudicial and improper; that the verdict was against the weight of the evidence; that the verdict was excessive; and that legal errors were committed throughout the trial.

Plaintiffs' counsel and witnesses during the retrial made some remarks irrelevant to damages issues and prejudicial to Kaiser. Notwithstanding extended discussion with counsel prior to trial and admonitions to counsel during the trial, the findings on liability were overstated or referred to unnecessarily. The testimony of plaintiffs' principal witness conveyed resentment of Kaiser which was not surpising. It seems that a trial limited to damages presented difficulties to counsel for both parties. But these were lapses from perfection in the course of lengthy, complex and vigorously contested proceedings. After reviewing the record as a whole and the instructions to the jury to consider only the issues on damages without prejudice or bias, we are of the opinion that the conduct of plaintiffs' counsel and witnesses does not warrant a new trial on damages.

A new trial may be granted on the ground that the verdict is against the weight of the evidence. *Neville, supra;* 6A *Moore's Federal Practice* ¶59.08 [5] (1982). In terms of the amount of damages awarded, a new trial may be granted when the damages assessed by the jury are "so unreasonable as to offend the conscience of the Court." *Murray v. Fairbanks Morse*, 610 F.2d 149, 152 (3d Cir. 1979). Stated either way, such a motion for a new trial is within the sound discretion of the court. *Id.* at 153. In exercising its discretion, the court may weigh the parties' evidence instead of looking only to whether the verdict winner

has introduced sufficient evidence on each essential element to preclude judgment as a matter of law. *Moore's Federal Practice, supra.* Greater scrutiny of a verdict is called for when the trial is "complicated and deals with a subject matter not lying within the ordinary knowledge of jurors." *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90-91 (3d Cir. 1960).

Even on a motion for a new trial judicial discretion must be exercised in a manner consistent with plaintiff's right to a trial by jury. The court may not substitute its own judgment for that of the jury merely because the judge as the finder of fact might have reached a different conclusion. That well established principle is not obviated simply because the trial is bifurcated.

> (N)either a trial nor an appellate court has the authority to substitute its judgment for that of the jury and thus usurp the jury's function as the principal finder of fact.

Collins v. Signetics Corp., 605 F.2d 110, 115 (3d Cir. 1979).

At the prior trial this court was guided by that principle. Based on the law of the case determined by the Court of Appeals, it found the evidence sufficient to support the jury's conclusion that defendants monopolized or attempted to monopolize the relevant product market in violation of Section 2 of the Sherman Act. The jury's determination on liability was not so against the weight of the evidence as to shock the conscience of the court. But the deficiency in plaintiffs' proof of damages convinced the court that the verdict as to damages should not stand. The evidence presented by the damage witnesses was incomplete, confusing and lacking in probative value and the factual basis for the estimates of losses was not made clear by the testimony. Since the damage award on that inadequate record had to be vacated, no explicit statement as to excessiveness was deemed necessary to the decision. After a retrial on damages at which plaintiff offered a different expert on damages and a new theory of the measure of damages or at least a new way of calculating damages, the court is faced with a difficult question: if plaintiff could not substantiate an untrebled award of

$1,815,000 at the first trial on damages, what is the effect of an untrebled award of $3,189,313 at this trial?

The record on retrial was different and more fully developed. The evidence was sharply in conflict; the issues were pointedly raised by the direct testimony and extensive cross-examination. Almost all of Bonjorno's statements on the financial history of his company, the state of the market for the years in question, his future intentions and the prospects of Columbia required credibility determinations. The implausibility of deeming Columbia an operating business between 1975 and 1977 was effectively raised. The witnesses on behalf of plaintiffs were subject to impeachment for lack of knowledge, prejudice against Kaiser or interest in the outcome of the case. The assumptions of plaintiffs' expert on the size of the market, Columbia's projected 50% share of a local market and 30% of the entire market were challenged as ignoring viable competitors, inflating revenues and deflating expenses. But all of this was placed before the jury by a fair charge; its role as factfinder in weighing the contradictory evidence and inferences and in drawing the ultimate conclusions as to the facts cannot properly be ignored. Whether the trial judge would reach the same conclusions is irrelevant. So long as evidentiary support for their jury findings exists, "we perceive the resolution of the conflicting claims as the traditional responsibility of the jury." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Therefore the court must refuse to set aside this verdict as excessive and respect the role of the jury in judging the credibility of the witnesses, assessing the weight given to expert opinions and resolving conflicting evidence.

Two judges have previously taken these questions from a jury. At the initial trial, a verdict was directed for defendants at the end of the plaintiffs' case on the ground that the evidence was insufficient to establish a market composed of aluminum culvert pipe or a monopolization of the relevant culvert pipe market and there was insufficient evidence of conspiracy in restraint of trade. The Court of Appeals reversed and remanded for trial. Following that trial, judgment on the verdict in favor of plaintiffs on liability and damages was set aside and a new trial

ordered on damages only. Now this court is requested to set aside a second award of damages by another jury.

"Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party." *Louisville & Nashville Railroad Co. v. Woodson*, 134 U.S. 614, 623 (1980). Wright and Miller, commenting on this dictum in *Federal Practice and Procedure*, Vol. 11 § 2803 at p. 35, observes:

> Of course there is no question but that a third trial may be ordered when the second trial, like the first, has been marred by a legal error. The more difficult question is whether the trial court may set aside successive verdicts as excessive, or against the weight of the evidence. That the power to do so exists seems perfectly clear, but it is equally clear that it is a power to be exercised only in the most exceptional cases. When two juries have reached substantially the same result, the possibility of a miscarriage of justice is very slight. [Footnotes omitted].

The usual circumstances weighing against the exercise of discretion in ordering a third trial on damages were well expressed by the trial judge in *Frank v. Atlantic Greyhound Corp.*, 177 F. Supp. 922 (D.D.C. 1959), *aff'd*, 380 F.2d 628 (D.C.Cir. 1970):

> When a new trial is granted on the ground that the verdict is contrary to the weight of evidence, or on the ground that the damages awarded by the jury are excessive or inadequate, the trial judge takes this action to prevent what he finds to be a miscarriage of justice. This step is taken only in exceptional cases, as great weight must ordinarily be accorded to the verdict of a jury. If a second jury arrives at the same result as did the first, the trial judge may well pause before setting aside the second verdict. Under such circumstances the parties have had two trials. The fact that two juries in effect agreed is entitled to a great deal of significance. Bearing in mind that a motion to set aside a verdict of a jury on the facts should be sparingly granted under any circumstances, *a fortiori* a second verdict reaching substantially the same result on practically the same evidence

> should greatly increase the hesitancy of the Court to award another trial. The possibility that a miscarriage of justice has resulted is greatly diminished under such circumstances. After all, there must be some point at which the granting of new trials in the same case should ordinarily stop. It may well be that if another new trial were granted, the same result would again be reached by a third jury.

177 F. Supp. at 923.

Here these circumstances are not present. The first new trial on damages was granted because there was a lack of an evidentiary basis for expert estimates not just because the verdict was against the weight of the evidence. Moreover, on retrial plaintiffs (perhaps because of the inadequate testimony of their previous damage expert), presented not only a different expert but a different theory of damages or at least a far different method for its calculation. So there has not been a second verdict reaching the same result on practically the same evidence.

But a trial judge should still pause before setting aside this second verdict because of the peculiar procedural posture of this case. The court's discretionary grant of a new trial is now limited to retrial on damages only. Defendants strenuously object to the fairness of this procedure (Defendants' Brief, pp. 18-60) and have preserved for appeal their argument that in practice if not in theory it was prejudicial error. It may be that if another new trial on damages were granted, the same result might again be reached by a third jury but would again be subject to the same objections, reviewable only on appeal. This court's determinations on liability will also be reviewed when this matter is again considered by the Court of Appeals. There may be no retrial at all but if there is to be a one, guidance from the Court of Appeals on the determination of the liability issues and the scope of the retrial is in the interests of the administration of justice and the need of the parties for the final termination of this litigation.

For the above reasons, a new trial as to damages is denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia?	None___	$ 728,000
2. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe?	None___	$ 742,520
3. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet?	None___	$ 80,000
4. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business?	None___	$1,638,793

/s/
Foreperson

Date: 12/2/81

PLEASE NOTIFY THE MARSHAL
WHEN DELIBERATIONS HAVE BEEN COMPLETED

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of January, 1983, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $1,638,793 in response to Interrogatory Four as to damages and otherwise DENIED.

2. The alternative Motion of defendants for a New Trial is DENIED.

3. Judgment will be entered on the verdict of the Jury as follows:

Actual Losses	$ 728,000
Lost Profits (Pipe)	742,520
Lost Profits (Sheet)	80,000
	$1,550,520
Trebled According to Law	×3
	$4,651,560

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
vs.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

FINAL JUDGMENT

AND NOW, this 17th day of January, 1983, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, the motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment Notwithstanding the Verdict having been granted in part and denied in part and the motion of defendants for a new trial having been denied,

IT IS ORDERED AND ADJUDGED

That the plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby, as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc. recover of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. the amount of $4,651,560 with interest at the rate provided by law and their costs of action.

/s/ Norma L. Shapiro
J.

BONJORNO, Joseph A., Kerr, George M., and Clisby, Barbara K., as Transferees of Liquidation and Dissolution of Columbia Metal Culvert Co., Inc., Appellants and Cross-Appellees,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION, Kaiser Aluminum & Chemical Sales, Inc., Robert A. Kennedy and Kennedy Culvert & Supply Company and Robert Kennedy, Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc., Appellees and Cross-Appellants.

Nos. 83-1047, 83-1079.

United States Court of Appeals,
Third Circuit.
Argued Sept. 13, 1983.
Decided Dec. 27, 1984.
Opinion on Denial of Rehearing and
Rehearing En Banc March 8, 1985.

Henry T. Reath, Michael M. Baylson (argued), Eric H. Auerbach, Richard L. Thurston, Duane, Morris & Heckscher, Philadelphia, Pa., for appellants and cross-appellees.

Richard P. McElroy (argued), William H. Roberts, Alexander D. Bono, Blank, Rome, Comisky & McCauley, Philadelphia, Pa., Stephen B. Ringwood, Kaiser Aluminum & Chemical Corp., Oakland, Cal., for appellees and cross-appellants.

Before SEITZ, GIBBONS and ROSENN, Circuit Judges.

OPINION OF THE COURT

SEITZ, Circuit Judge.

I.

The plaintiffs appeal from an order of the district court partially granting judgment notwithstanding the verdict which eliminated the largest element of the jury's damage award in an

antitrust action. The defendants, Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum and Chemical Sales, Inc. (collectively "Kaiser") cross-appeal from a judgment entered after a special jury verdict finding them in violation of the antitrust laws. This court has jurisdiction under 28 U.S.C. §1291 (1982).

II. Background

The plaintiffs were the sole stockholders of the now defunct Columbia Metal Culvert Co., Inc. ("Columbia") which was at one time a fabricator of aluminum drainage pipe in Vineland, New Jersey. They allege that Kaiser monopolized the market for aluminum drainage pipe in the Mid-Atlantic region of the United States in violation of sections one and two of the Sherman Act, 15 U.S.C. §§1 and 2 (1982).

Columbia began to manufacture aluminum drainage pipe in 1962. Originally, Columbia purchased all of its raw materials from Kaiser. The raw material for manufacturing pipe comes in two primary forms: corrugated aluminum sheet which is rolled and riveted into pipe, and aluminum coil which is formed into helical pipe by a spiraling machine. Initially, Columbia purchased only sheet, but in 1970, it acquired a spiraling machine, and thereafter produced mostly pipe formed from coil.

In 1972, Columbia and Kaiser had a falling out, after which Kaiser no longer sold coil to Columbia, which thereafter purchased its raw materials from Alcoa and Reynolds. In 1973, Columbia's best salesman, Robert Kennedy, left Columbia to become an independent distributor of Kaiser's aluminum pipe. At the same time, Kaiser opened a pipe fabrication plant only a few miles from Columbia's. In 1974, Kaiser along with the other major aluminum producers raised the prices of aluminum coil and sheet to roughly the same price that Kaiser charged for the finished pipe. Throughout this period, Kaiser produced approximately 80% of all the aluminum pipe used in Columbia's geographical marketing region.

The plaintiffs allege that as a result of Kaiser's conduct, Columbia began experiencing financial difficulties, and stopped producing pipe in 1975. Eventually, Columbia's assets were sold

to a third party in 1978. In 1981, the third party sold the remaining assets of Columbia to Kaiser.

This action was first filed in January of 1974 under section four of the Clayton Act, which gives a private cause of action under the antitrust laws, alleging, *inter alia*, violations of sections one and two of the Sherman Act. At the first trial in 1977, the district court directed a verdict for Kaiser at the conclusion of plaintiff's evidence. This court reversed, holding that there was sufficient evidence to permit the case to go to the jury. *Columbia Metal Culvert Co., Inc. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied* 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978). A second trial held in 1979 resulted in a jury verdict for the plaintiffs and an award of damages. The district court, however, granted in part the defendants' post-trial motion for a new trial by ordering a trial on damages only. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F.Supp. 102 (E.D.Pa.1981). A limited retrial was conducted in 1981, resulting in a damage award of $9,567,939 after trebling. The district court then granted, in part, the defendant's motion for judgment notwithstanding the verdict, reducing the judgment to $4,651,560. 559 F.Supp. 922 (Pa.1983)

The plaintiffs appeal the reduction of the damage award, and the defendants cross-appeal the failure of the district court to grant a new trial or to grant in full their motion for a judgment notwithstanding the verdict. We turn first to the defendants' cross-appeal.

III. The Doctrine of Intra-Enterprise Conspiracy

The defendants contend that the jury verdict must be set aside and a new trial ordered because of the recent decision in *Copperweld Corp. v. Independence Tube Co.*, ____ U.S. ____,104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). In that case, the Supreme Court held that a parent corporation and its wholly owned subsidiary cannot be considered separate entities for purposes of section one of the Sherman Act. Thus, a parent corporation and its wholly owned subsidiary cannot by themselves violate that provision which requires concerted action by

at least two participants. Because the two entities in the section one claim in this case are the Kaiser Aluminum & Chemical Corporation ("KACC") and its wholly owned subsidiary Kaiser Aluminum & Chemical Sales, Inc. ("KACSI"), the defendants contend that the finding of liability must be set aside if the *Copperweld* rationale is applicable to this case.

This court had previously held that the plaintiff could proceed with a section one claim based on a conspiracy between the parent KACC and its subsidiary KACSI. 579 F.2d at 33-35. After oral argument was heard on this appeal, the Supreme Court granted the petition for certiorari in the *Copperweld* case. The parties were asked to submit supplemental briefing on the potential effect of *Copperweld.* After due consideration, we decided to defer resolution of this appeal until after the Supreme Court decided *Copperweld.*

Having now considered the decision of the Supreme Court, we believe that it is unnecessary to reach the issue of the applicability of *Copperweld* because the damage award may be sustained solely on the separate section two verdicts that do not depend on a theory of intra-enterprise conspiracy. Kaiser contends that when a verdict may rest on either of two claims, one supported by the evidence and the other not, a judgment thereon must be reversed. *See Simko v. C & C Marine Maintenance Co.,* 594 F.2d 960 (3d Cir.), *cert. denied,* 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 42 (1979). The case that Kaiser cites, *Simko,* rested on a general verdict in which it is impossible to determine if a jury found the defendant liable on both grounds or only one ground. In this case, special interrogatories were submitted to the jury on each of the theories of liability, and the jury determined that the defendants violated both section one and section two of the Sherman Act. Under these circumstances, we are not required to remand for a new trial solely because the section one claim may be invalid.

The defendants argue, however, that the causation of damages from the monopolization and attempt to monopolize verdicts are also tainted by the theory of intra-enterprise conspiracy. The jury returned separate verdicts against the defendants for monopolization, attempt to monopolize, and

conspiracy to monopolize under section two. Although the conspiracy verdict, which depended upon an intra-enterprise conspiracy, was separately rendered, only a single interrogatory was asked as to causation of injury. The jury answered "yes" to the question: "[W]as any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of the plaintiff?"

The defendants contend that *Copperweld* must necessarily apply to a section two conspiracy to monopolize, and since the jury was not asked separate questions on proximate cause, it is impossible to determine if the jury found that the injuries were caused by an impermissible theory of liability. The defendants' contentions succeed only if it were possible that the jury could infer that some of the plaintiffs' injuries resulted solely from the conspiracy and not from the monopolization or attempt to monopolize. Assuming without deciding that *Copperweld* applies to a section two conspiracy, we conclude that it was not possible for a reasonable jury in this case to find that injury was caused by conduct pursuant to the conspiracy that was not also conduct in furtherance of the monopolization or the attempt to monopolize.

Specific intent is an element of a conspiracy to monopolize. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 626, 73 S.Ct. 872, 889, 97 L.Ed. 1277 (1953); *Fleer Corp. v. Topps Chewing Gum, Inc.,* 658 F.2d 139, 154 (3d Cir.1981), *cert. denied,* 455 U.S. 1019, 102 S.Ct. 1715, 72 L.Ed.2d 137 (1982). Because the jury was charged that it had to find that there was a specific intent to monopolize before returning a verdict on conspiracy to monopolize, the jury necessarily found that both the parent KACC and the subsidiary KACSI had the specific intent to monopolize the aluminum pipe market. Thus any concerted activity undertaken in the conspiracy that could give rise to damages would have been undertaken with the purpose of monopolization. Because the conspiracy defendants are the same defendants in the monopolization and attempt to monopolize charges, any activity in the conspiracy, which must

have had the purpose of monopolization, would necessarily be attributable to the same defendants as part of the monopolization or attempt to monopolize.

Furthermore, the defendants do not point to any evidence in the record that evinces actions in the conspiracy that could give rise to damages and that are not necessarily part of the attempt to monopolize or the monopolization. Thus, under the particular circumstances of this case, we conclude that the jury verdict and award of damages would be the same even if the jury had not been instructed that KACC and KACSI could be considered separate entities.

IV. The Monopolization Claim

A. The Effect of This Court's Decision in 1977

We next turn to Kaiser's contention that its motion for a judgment notwithstanding the verdict should have been granted because the evidence was insufficient to support the claim of monopolization or attempt to monopolize. The plaintiffs argue that Kaiser may no longer raise this issue because this court had determined on the appeal from the first trial that there was sufficient evidence of monopolization to go to the jury. *Columbia Metal Culvert Co. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978).

The evidence presented at the liability 1979 trial, however, differed in several material respects from the evidence presented at the first 1977 trial. In particular, the plaintiffs' evidence at the later 1979 trial significantly undercut the economic significance of the facts that the parent KACC charged its subsidiary KACSI a price for aluminum sheet and coil that was well below the market price while at the same time KASCI was selling coil to independent pipe fabricators at the higher market price. Kaiser's pricing policies with respect to its subsidiaries and to independent fabricators were elements of our earlier decision. 579 F.2d at 31.

Because there were material differences in the evidence presented at the two trials, we believe that the question of the

sufficiency of the evidence presented at the 1979 liability trial is still open for review. *See Johnson v. Bernard Ins. Agency, Inc., 532 F.2d 1382, 1384 (D.C.Cir.1976).*

B. Sufficiency of the Evidence of Monopolization

There are two main elements in monopolization: "(1) the possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966); *Borough of Landsdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir.1982).

Kaiser's contentions on liability in this appeal go to the question of whether there is insufficient evidence that its alleged conduct demonstrates the willful acquisition or maintenance of monopoly power.[1]

In reviewing a record for sufficiency of the evidence, this court must expose the evidence to the light most favorable to the non-movant with the advantage of every fair and reasonable inference. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977).

1. *Kaiser Attempted to Control Its Competition.* There was evidence that Kaiser attempted to control the independent fabricators by requiring them to purchase all of their raw materials from Kaiser. Mr. Bonjorno of Columbia, and Mr. Arvay of U.S. Aluminum, a South Carolina fabricator, both testified that Kaiser attempted to coerce the fabricators into purchasing only from Kaiser. There was testimony that Holmes Collins, the Kaiser manager of the division that manufactured

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1. In this appeal, Kaiser does not contest that the relevant product market is aluminum drainage pipe, or that the relevant geographic market is the Mid-Atlantic states. Nor do any of the issues raised by Kaiser in this appeal relate to whether it possessed monopoly power or whether that power was a consequence of a superior product, skill, or historical accident.

and marketed the aluminum pipe, threatened to open a pipe fabrication plant "across the street" from Columbia if it purchased its raw materials from other sources. There were threats that if Kaiser saw so much as one pound of metal from another producer that it would terminate its relationship with Columbia. When Columbia did purchase aluminum from another company, Kaiser carried through with its threats by locating a pipe plant only 40 miles from Columbia's and by refusing to sell any more coil to Columbia. Finally, there was evidence that Holmes Collins told Columbia's owners that Kaiser would control Columbia's growth and market.

From this evidence, a jury could infer that Kaiser wanted to control the source of the raw materials for the independent fabricators and thus, indirectly, wanted to control the price of independents' finished pipe. The mere location of a plant, or the unilateral refusal to deal may not, by themselves, be antitrust violations. However, the combination of the threats as well as evidence that Kaiser's management had originally requested that the plant be located elsewhere is evidence from which a jury could legitimately infer that Kaiser attempted to control its competition, and failing that, tried to destroy it.[2] *Schine Theatres v. United States,* 334 U.S. 110, [illegible] S.Ct. 947, 952, 92 L.Ed. 1245 (1948) (threat of opening theatres by a monopolist is evidence of intent) (*Copperweld, supra,* overruled the section one charge in *Schine,* but re-affirmed the section two charge).

2. *Kaiser's Actions to Destroy Columbia.* In addition to locating a plant near Columbia's, the plaintiffs allege that Kaiser engaged in a series of deliberate acts to drive Columbia out of the pipe market. The most serious claims is that Kaiser deliberately raised the price of the raw materials to the same level as the price that it charged for the finished pipe, thus making it impossible for Columbia to operate at a profit if it sold pipe

2. Further evidence of Kaiser's attempt to control or exclude competition lay in the veiled threats that Holmes Collins made to Alcoa. Alcoa's manager testified that Collins stated that "if [Alcoa] thought that [it] could sit back and enjoy a participation in this market by merely being a supplier of coil sheet to independent pipe fabricators, [Alcoa] had another thing coming, or some words to that effect." App. at 1085.

competitively with Kaiser. The plaintiffs term this price condition a "price squeeze."

The evidence and the record show that for a significant period of time in 1974, the distributor list price of Kaiser's aluminum pipe, per pound, was just above, or even below, the market price for aluminum coil. The mere existence, however, of a "price squeeze" is not necessarily an anti-trust violation. The plaintiff must present evidence that the defendants deliberately produced the effect, sufficient to provide a reasonable basis for the jury to conclude that the "squeeze" was not the result of natural market forces such as supply and demand or legitimate competition. *Cf. California Computer Prods. Inc. v. IBM,* 613 F.2d 727, 735 (9th Cir.1979).

To show that the price squeeze was a deliberate act on the part of Kaiser, the plaintiffs produced evidence that Kaiser controlled both the price of the raw material and the price of the finished pipe, and that Kaiser exercised that power. That Kaiser could control the price of the finished pipe is evident. By setting the price at which it is sold to distributors, Kaiser effectively controlled the prices at which the distributors bid to contractors. Further, because of Kaiser's large market share, it was likely that it or one of its distributors would be bidding on nearly every job. In this fashion, Kaiser, if it desired, could keep the prices of the pipe low.

The plaintiffs' evidence of Kaiser's control over the prices of the raw material, aluminum coil, is more problematic. In part, it lies in understanding the nature of the market for aluminum coil and sheet used in fabricating pipe. Prior to 1974, Kaiser and some of the other aluminum producers maintained a separate price list, called a commodity price, for aluminum alloy sold to fabricators to manufacture pipe. The commodity price was usually lower than the general or specification price charged for the same alloy used for other purposes. It was never contended, however, that Kaiser lost money at the lower commodity price, and KACSI usually reported a profit from the sale of coil and sheet at the commodity price. App. at 4674-4824.

Kaiser was not the largest supplier of aluminum coil or sheet to independent fabricators, although if the aluminum used

by its own pipe plants were included, it produced over 80% of the aluminum used for making pipe. Kaiser contends that since it was not the dominant force in the commodity price market for aluminum coil and sheet, it did not control the prices of the raw materials. The plaintiffs' theory, however, was that Kaiser was a price leader, and that Reynolds and Alcoa, the other major aluminum producers, usually followed Kaiser's pricing strategy. Thus, Kaiser's prices would determine the market prices.

The principal evidence in support of this theory was the testimony of Professor Oliver Williamson, an economist and expert in antitrust. He testified that the aluminum industry was an oligopoly limited to a few major producers of aluminum, and that in particular lines of aluminum products, one of the producers became dominant and set the pricing strategy for the rest of the industry. He indicated that the other aluminum producers usually followed the price leader because if an aluminum producer did not comply, it would not be followed in the areas where it was dominant. He further indicated that there were economic studies that tended to show that the price leadership phenomenon was especially noticeable during the early to mid-1970's and that aluminum prices were kept high by the producers during the relevant period.

Further, Dr. Williamson testified that he believed that Kaiser was the dominant firm in setting the prices for aluminum coil and sheet used in making pipe. Dr. Williamson's opinion that Kaiser was the dominant firm in the aluminum pipe area was buttressed with evidence that showed that Kaiser was the largest producer of coil used for pipe, that it was the only major manufacturer who had an extensive marketing and engineering staff who actively promoted and studied the uses of aluminum pipe, and that Kaiser had the largest interest in pipe prices because it sold over 80% of the aluminum pipe in the country. If there were price leadership, it would be most likely that Kaiser set the pricing policies because of its extensive expertise and investment, rather than Reynolds of Alcoa who had so little involvement in the area.

That there was price leadership was supported by the testimony of Thomas Melrose, a manager of Alcoa, and Lonsdale

Lawrence, an engineer from Reynolds. Melrose testified that Alcoa did not independently set prices but followed the prices that Kaiser and Reynolds set for the corrugated aluminum sheet used for making pipe. Lawrence testifed that for corrugated sheet, Reynolds would follow Kaiser's announced prices each time the prices changed. Although Melrose's and Lawrence's testimony was in reference to corrugated sheet and not to coil, their testimony confirms Dr. Williamson's general observations on the existence of price leadership in the aluminum drainage pipe raw material market. Further, the evidence indicated that the prices for coil and sheet as raw materials for pipe did not differ in material respects.

Kaiser contends, however, that the plaintiffs' documentary evidence on the actual prices charged by the three major manufacturers failed to show price leadership. In particular, Kaiser points to evidence that on one occasion Alcoa raised the price of aluminum coil three days before the effective date of Kaiser's comparable price change as proof that Alcoa, and not Kaiser, was the price leader.

Dr. Williamson testified, however, that a pricing change did not have to be initiated by the price leader. Also, Alcoa's price change, although occurring three days before the effective date of Kaiser's change, may have been made after Kaiser announced its change either publicly or privately.

At most, Columbia's pricing evidence was susceptible of an inference inconsistent with price leadership. When contradictory inferences can be drawn from the evidence, the question should be resolved by the jury and it is not a matter for the consideration of the court on a motion for a JNOV. Given that Dr. Williamson's opinion was well supported by the evidence, we cannot say that the question of price leadership should not have gone to the jury.

The next question is whether the evidence shows that Kaiser deliberately manipulated the coil and pipe prices to create a squeeze. There was evidence that the squeeze was not caused by natural market forces.

The most significant evidence of deliberate manipulation of the coil prices was Kaiser's withdrawal of the commodity price

for coil in January of 1974. This caused a steep rise in the price of coil from about 38 cents per pound to about 44 cents per pound. At approximately the same time, Alcoa and Reynolds raised their coil prices to the same price levels. Dr. Williamson testified that he believed that the price hike was made for "strategic" reasons. Even Kaiser's manager, Holmes Collins, testified that the commodity price was withdrawn because Kaiser no longer wished to sell to independent fabricators. Thus, Collins' testimony supported an inference that the price change was not related to costs but was intended to affect the independent competition.

Perhaps some of the strongest evidence that the price sqeeze was deliberate lies in the relationship of the price of coil charged by Kaiser and its distributor price for pipe. If the coil prices charged by KACSI truly reflected the cost of the coil plus a fair return, then the price of the finished pipe should be higher by at least the fabrication cost of the pipe. However, the price of the pipe was often below the price of the coil during the first six months of 1974. Alternatively, if the price of the pipe reflected Kaiser's true costs plus a fair return, then the price of the raw material should be less by at least the cost of the fabrication. Thus, either the pipe prices were too low, or the raw material prices too high.

Further evidence that the price squeeze was deliberate lay in the transfer price system used by Kaiser. The transfer price is the price that the parent KACC charged its subsidiary KACSI for aluminum. The transfer price was a fixed price per pound that is set once a year and reflects the projected direct costs of producing the aluminum and excludes an allowance for corporate overhead. As such, the transfer price is usually well below the market price. Althouh the transfer price system itself is not evidence of classic predatory behavior, Kaiser's system permitted KACSI to set coil prices for its competitors without affecting its pipe costs. Usually, the market price of the raw materials determines the price of the finished product. In this case, Kaiser could set whatever market price it chose for the raw material, within certain limits, without directly affecting its market price for pipe.

Given these facts, there was sufficient evidence for the jury to conclude that Kaiser not only possessed the power to create the price squeeze, but that it exercised that power to destroy its competition. *See United States v. Alcoa*, 148 F.2d 416 (2d Cir.1945).

There is additional evidence that Kaiser sought to destroy Columbia by setting up Robert Kennedy as a distributor. There is evidence that Kaiser extended credit to Kennedy even though its credit department concluded that Kennedy's operation was an "unacceptable credit risk." App. at 4466. The jury could infer that by going against the very strong recommendation of its credit department, Kaiser displayed its intent to drive Columbia out of business. *See Columbia*, 574 F.2d at 31. *Cf. Greyhound Computer v. IBM*, 559 F.2d 488, 498 (9th Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 796 (1978) (If a jury concludes that a manufacturer possesses monopoly power, then it would be precluded from otherwise lawful practices that exclude competition). Although Kaiser contends that the credit department did eventually approve of the Kennedy account, the evidence indicates that during the first year, Kaiser extended Kennedy up to at least $78,000 credit secured by no more than Kennedy's $25,000 letter of credit and by a security interest in the accounts receivable, which was not much more than the security earlier evaluated by the credit department as unacceptable. App. at 4466.

Further, contrary to Kaiser's contentions, we do not consider that Kennedy's dismissal as a defendant renders the evidence of Kennedy's activities irrelevant to the monopolization claims against Kaiser. The district court's instructions in this regard were fully consistent with this court's earler opinion. *See Columbia*, 579 F.2d at 31, 36.

When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for the finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act. *See* Handler, Some Unresolved Problems of Antitrust, 62

Colum.L.Rev. 930, 934 (1962). Given the evidence of Kaiser's anticompetitive behavior, we hold that there was sufficient evidence to permit the monopolization claim to go to the jury.[3]

V. Contradictory Evidence Presented at the Liability and Damage Trials

Kaiser also contends that a judgment notwithstanding the verdict (JNOV) should have been granted because the plaintiff produced evidence at the trial on damages that contradicted the evidence presented at the liability trial. Kaiser, however, fails to explain the legal theory supporting its contention.

Normally, when the evidence is contradictory, a JNOV is inappropriate. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir.1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977). The assumption is that the jury should decide factual issues involving contradictory evidence. In this case, however, no single jury heard all of the allegedly contradictory testimony. Kaiser's argument must be that if a single jury had heard both the evidence on liability and damages, then that jury would not have returned a verdict against Kaiser. Under this theory, however, a JNOV is not the proper remedy in this case. There was sufficient evidence of monopolization to go to the jury, even if, as Kaiser contends, the plaintiffs' introduced evidence that was inconsistent with their theory of liability.

The proper remedy, at best, would be a new trial on both liability and damages. Kaiser, however, does not argue for a new trial on the ground that testimony inconsistent with the theory of liability was introduced at the damages trial.

Even if we were to construe Kaiser's arguments for a JNOV as a request for a new trial in the alternative, we do not believe that substantial justice dictates that a new trial be ordered. *Cf. Scott v. Plante*, 641 F.2d 117, 136 (3d Cir.1981),

3. Kaiser does not contend on this appeal that there was insufficient evidence as to any issues, such as specific intent to monopolize or a dangerous probability of achieving monopoly power, that relate solely to the attempt to monopolize claim. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir.1975).

vacated on other grounds, 458 U.S. 1101, 102 S.Ct. 3474, 73 L.Ed.2d 1362 (1982). If the district court committed error, it would have been in its failure to order a full new trial in 1981 when it ordered the limited retrial on damages. In general, the ordering of a new trial is committed to the sound discretion of the district court. In this case, we cannot say that the district abused its discretion. The liability trial was properly conducted and there was no need to expend further judicial resources retrying liability.

In some situations, however, the seventh amendment right to a jury trial is implicated if the issues in the separate retrial on damages are so interwoven with the issues of liability already tried that it is unjust to try the damages separately. *Gasoline Prods. Co. v. Champlin*, 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931). In this case, it might be argued that the issues are interwoven if the theory of damages relied upon was inconsistent with the liability theory, thus requiring a single jury to resolve the inconsistency. We believe, however, that the issues are not interwoven because the theory of damages was consistent with the theory of liability.

Kaiser claims that Dr. Bowman, the plaintiffs' expert witness at the damages trial, contradicted the theory that the price squeeze was deliberately caused by Kaiser and not the result of natural market forces. First, Dr. Bowman testified that he could estimate a free market price for pipe by using the price of coil as a base figure and then adding to the coil price a certain percentage of the base figure to account for fabrication costs and a reasonable profit. In choosing a base figure, Dr. Bowman used the actual coil prices charged by Alcoa and Reynolds from 1973 to 1977. Thus, Kaiser charges, the implication of Dr. Bowman's testimony is that the coil prices would have been the same in a free market. However, the theory of liability was not that the prices of the raw materials were too high, but that Kaiser deliberately caused a price squeeze condition. The jury did not find that there was a price conspiracy among Kaiser, Alcoa, and Reynolds. The plaintiff was entitled to show that in a free market, either the pipe prices would have been higher or the raw material prices lower during the period of the price

squeeze. In constructing a hypothetical world free of the defendants' exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative. *See Litton Systems v. American Telephone and Telegraph Co.*, 700 F.2d 785, 822-23 (2d Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984). Dr. Bowman anchored his theory to the actual prices of coil over a five year period. If he had constructed a hypothetical price for coil to calculate a hypothetical price for pipe, his theory would have been far more speculative. Under present circumstances, we do not believe that the implications of Dr. Bowman's testimony were so inconsistent with the plaintiffs' theory of liability as to warrant a new trial.

The second set of statements that Kaiser alleges contradicts and disproves the price squeeze theory was a statement by Dr. Bowman that the free market price of pipe from 1973 to 1977 would have been "substantially similar" to the actual prices for pipe charged by Kaiser. Dr. Bowman, however, testified also that actual pipe prices were "depressed" and "tended to be lower" than his hypothetical free market pipe prices. App. at 6520 and 6531. If actual pipe prices were lower than the hypothetical prices, then his testimony was consistent with the liability theory. The only inconsistency is that Dr. Bowman appeared to contradict himself when he testified that the prices were "substantially similar."

Dr. Bowman's statements are not necessarily inconsistent. His statements applied to a five year period of time. Pipe prices may have been fair over a five year period and still have been depressed during the shorter time period involved in the price squeeze. Further, even if Dr. Bowman's testimony was internally inconsistent, it was an inconsistency entirely before the damages jury. Dr. Bowman's credibility was properly before the damages jury and is not grounds for a new trial.

VI. Bifurcation of Trial on Liability and Damages

Kaiser next argues that because the liability jury did not distinguish among the alleged anticompetitive acts in its determination of causation, the damages jury could not know

from what acts they could attribute damages. Thus, Kaiser contends, the issues on liability could not be separated from the issues on damages. We believe that Kaiser has confused the questions of causation and calculation of damages. Causation is an element of liability in this case. *See REA v. Ford Motor Co.*, 560 F.2d 554, 557 (3d Cir.), *cert. denied*, 434 U.S. 923, 98 S.Ct. 401, 54 L.Ed.2d 281 (1977). The liability jury properly found causation from only those acts which could evince the defendants' willful acquisition or maintenance of a monopoly. *See Brunswick Corp. v. Pueblo Bowling Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). In finding causation, the jury must find the nexus between the act and the injury. Once a jury has properly found causation of antitrust injury from unlawful activity, however, the damages in this case may be determined without strict proof of what caused which injury as long as the damages are not based upon speculation or guesswork. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983).

Here, this result follows because it would be extremely difficult, if not impossible, to segregate and attribute a fixed amount of damages to any one act. The plaintiffs' basic injury was that Columbia was driven out of business. Further, the theory of the section two violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business. When the antitrust injury is of an indivisible nature, the courts have permitted a relaxed standard of proof in calculating damages. *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 565-67, 101 S.Ct. 1923, 1929-30, 68 L.Ed.2d 442 (1981); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). When the antitrust injury is of an indivisible nature, and the jury properly found that that injury caused by the defendants' monopolization or attempt to monopolize, and when the plaintiffs' proof of damages does not require distinguishing the various acts by the defendants, then it is unnecessary to segregate the damages according to the specific

causes, and therefore, the issues in the liability trial are not so interwoven with the issues in the damages trial as to require a retrial of both.

VII. Prejudicial Conduct During the Damages Trial

Kaiser contends that the conduct of the damages trial was prejudicial to Kaiser because the jury was informed about some of the anticompetitive acts alleged by the plaintiff. It is of course necessary, when conducting a bifurcated trial before two juries, to inform the second jury about some of the evidence and results of the first trial. *MCI v. American Tel. & Tel. Co.*, 708 F.2d at 1168. This is not to say that the second jury was to evaluate or decide factual issues that were involved in the first trial. In this case, antitrust matters are extremely complex, and it would have been unfair not to give the jury some background material on the trial. Questions of trial conduct are committed to the discretion of the trial court. The trial court attempted to conscientiously balance the need of the jury to know about the case and prejudice to the defendant. We believe that the district court acted in an exemplary manner in its conduct of an extremely long and complicated trial and did not abuse its discretion in permitting the jury to hear some explanation of the finding of liability.

Kaiser also contends that plaintiffs' counsel repeatedly flouted the district court's rules and referred to prejudicial matters. The district court, after reviewing the entire record, concluded that it was not sufficiently prejudicial to warrant a new trial. We find no abuse of discretion. *See Pitchford v. Pepi*, 531 F.2d 92, 106 (3d Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed.2d 387 (1976).

VIII. The Calculation of Damages

With respect to the separate trial on damages, Kaiser raises several issues. First, Kaiser contends that its motion for JNOV should have been granted because the projected market share analysis used for plaintiffs' calculation of lost profits failed to account for competition by other independent pipe fabricators.

Kaiser further contends that the failure of an expert to account for significant factors in his analysis was an error of law and subject to plenary review in this court. Presumably, Kaiser must be suggesting that the testimony of plaintiffs' expert is inadmissible because it is unsupported; and if it were struck, then the remaining evidence would be insufficient to support the damages verdict and Kaiser would be entitled to a JNOV.

We note that Kaiser neither raised this issue specifically in a motion for a directed verdict, nor did it object to the jury instructions on this matter. Thus, Kaiser is not entitled to a JNOV, nor may it raise this issue on appeal as an error of law. *See infra Section IX*, Fed.R.Civ.P. 50(b), 51; *Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984); *Herman v. Hess Oil*, 524 F.2d 767 (3d Cir. 1975).

Even if, however, we were to construe Kaiser's motion for a directed verdict to have raised this question, we would not hold that the JNOV should have been granted. The testimony of Dr. Bowman made clear that he was aware of, and accounted for the presence of other aluminum pipe fabricators. His testimony was supported, and therefore, admissible. At best, Kaiser's contentions go to the weight of the evidence and not its admissibility. That, however, was for the jury. *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 108-09 (3d Cir. 1976).

As to Kaiser's remaining contentions on damages, we have examined the record and conclude that the district court did not err in allowing damages for both lost profits and actual losses; nor did the district court err in failing to instruct the jury on plaintiffs' duty to mitigate damages; nor did the district court err in permitting the jury to consider damages for lost profits on projected sales outside of the geographic and product markets stipulated for liability purposes.

IX. The Plaintiffs' Appeal

The district court granted, in part, Kaiser's motion for JNOV as to one aspect of damages. It eliminated the jury award for diminution of going concern value as inappropriate as a

matter of law when Columbia had not literally gone out of business as of the date used in the damage calculation.

The plaintiffs contend on their appeal that a grant of a JNOV was improper when Kaiser failed to assert this ground in its motion for a directed verdict at the close of the evidence. *See* Fed.R.Civ.P. 50(b). Kaiser made an oral motion for a directed verdict at the conclusion of all the evidence on damages. Kaiser specifically asserted three grounds for a directed verdict: (1) the evidence failed to show that Columbia was injured by Kaiser; (2) the damage calculations included projected sales outside of the stipulated geographic market; and (3) there was insufficient evidence of a price squeeze. Kaiser never raised in its motion for a directed verdict the contention that damages based on a diminution of going concern value may not be awarded in this case.

The specific grounds for a JNOV must be asserted in the motion for a directed verdict. *Abraham v. Pekarski,* 728 F.2d 167, 172 (3d Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984). If the issue was not raised in the motion for the directed verdict at the close of all the evidence, it is improper to grant the JNOV on that issue. *Id. See also Mallick v. IBEW,* 644 F.2d 228, 233-34 (3d Cir.1981); *Systemized of New England, Inc. v. SCM, Inc.,* 732 F.2d 1030, 1035-36 (1st Cir.1984); *U.S. Industries, Inc. v. Blake Const. Co., Inc.,* 671 F.2d 539, 548 (D.C.Cir.1982).

The requirement that the specific issue be raised first in the motion for a directed verdict, before the issue is submitted to the jury, affords the non-moving party an opportunity to reopen its case and present additional evidence. *Lowenstein v. Pepsi-Cola Bottling Co.,* 536 F.2d 9, 11 (3d Cir.); *cert. denied,* 429 U.S. 966, 97 S.Ct. 396, 50 L.Ed.2d 334 (1976). Further, when a trial court decides an issue after it was properly submitted to the jury, it may deprive the non-moving party of his seventh amendment rights. *Id.*

In this case, Kaiser contends that it raised the issue in a colloquoy with the district court concerning jury instructions. A request for jury instrucitons may suffice to fulfill the requirement that a motion for a directed verdict be made before

granting a JNOV only if it is clear that the district court treated the request as a motion for a directed verdict and ruled on it as such. *Mallick,* 644 F.2d at 234; *Lowenstein,* 536 F.2d at 11. We have studied the record in great detail at the places noted in Kaiser's brief and we can find nothing that would have put the plaintiffs or the district court on notice that after all the evidence had been presented Kaiser was raising an issue as to whether damages for diminution of going concern value could be awarded. The record shows that Kaiser only objected to the wording of a jury instruction and agreed that the instruction on diminution of going concern value could be submitted to the jury after it was reworded. App. at 7529-31.

Finally, even if, contrary to our conclusion, we were to assume that Kaiser had properly raised the issue in its motion for a directed verdict, it was error for the district court to have ruled for the defendants on this aspect of the motion for a JNOV. The plaintiffs' theory at trial was that damages for diminution of going concern value could be awarded as of the date that Columbia had effectively gone out of business. The plaintiffs argued to the district court that Columbia had ceased manufacturing operations prior to May 31,1977 and would have gone out of business by that date because of Kaiser's anticompetitive activities if Columbia had not received an Economic Development Administration loan from the United States Department of Commerce. The loan permitted Columbia to continue operations for a few months before it ultimately went out of business and liquidated its assets. The plaintiffs presented evidence to support their theory and the jury was instructed, without objection, as to the plaintiffs' theory.

Kaiser neither submitted contrary jury instructions, nor did it object to the jury instructions as required by Fed.R.Civ.P. 51. The district court also specifically asked counsel for Kaiser whether he objected to the plaintiffs' legal basis for seeking damages for diminution of going concern value, and Kaiser's

counsel raised no objection to the submission of the issue to the jury. App. at 7529-7531.[4]

By granting Kaiser's motion for JNOV, the district court effectively repudiated its own jury instructions even though Kaiser had not challenged the legality of the plaintiffs' damages theory. Having properly submitted the issue to the jury, it was error to rule on a JNOV that the plaintiffs, as a matter of law, could not recover for diminution of going concern value on the ground that Columbia had not actually liquidated on the date used for the damages calculation.

We conclude that Kaiser failed to preserve for JNOV consideration the ground relied upon by the district court to grant the JNOV, and that the district court incorrectly decided that the jury determination was erroneous. To the extent that the district court's order granted the motion for a JNOV, it will be reversed.

X. Conclusion

The order of the district court granting in part the defendant's motion for a JNOV will be reversed. The judgment entered by the district court on January 18, 1983 will be vacated and the judgment entered on December 4, 1981 will be reinstated, and that judgment will be affirmed.

Statement of ADAMS, Circuit Judge, sur denial of the petition for rehearing in banc.

I respectfully dissent from the order denying rehearing in banc, because I believe that this case raises a number of issues of sufficient import to command the attention of the entire Court.

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4. For example, the plaintiffs submitted a proposed jury instruction which stated, *inter alia*, "An antitrust plaintiff may recover both lost profits and the value of the business as a going concern as of the date the business terminated or made effectively dormant by the actions of defendants." App. at 5601. Kaiser's counsel, when asked by the district court if he had any objections to the instruction replied, "I don't really have an objection to the description of what the plaintiff is seeking to do here, your Honor. It is just the way this is phrased. It is not really an objection to the concept of the charge." App. at 7531.

First, I believe there is a serious question whether Kaiser's contentions regarding the applicability of the Supreme Court's recent decision in *Copperweld Corp. v. Independent Tube Co.*, ____ U.S. ____, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), have been properly answered. Copperweld, handed down after the trial but before the decision of the panel, holds that a parent and a wholly-owned subsidiary are not considered separate entities for purposes of a conspiracy charge under section 1 of the Sherman Act, 15 U.S.C. §1. If there can be no intra-enterprise conspiracy under section 1 of the Sherman Act, Kaiser asserts that logic dictates a similar result under section 2 of the Sherman Act. If Kaiser is correct, then the propriety of the jury's verdict which relied in part on such a conspiracy is called into question.

Second, the bifurcation of the trial resulting in different juries determining liability and damages raises serious questions under the standard set forth by the Supreme Court in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931). This Court has recently recognized the continued vitality of *Gasoline Products*—that retrial of only one issue in a case, such as liability, is not proper unless "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500, 51 S.Ct. at 515. In *Stanton by Brooks v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 576 (3d Cir.1983), this Court emphasized the danger of separate trials on damages and liability, particularly when there is evidence, as here, that the first jury reached a compromise verdict. This is illustrated by the fact that the first jury here returned a damage verdict of $5,445,000 when trebled and the second jury returned a verdict of $9,567,939 when trebled.

Finally, the substantial expansion of the "price squeeze" theory of liability also merits attention. Kaiser has been found guilty of utilizing an unlawful price squeeze even though during the years in question plaintiff was purchasing its raw materials from Alcoa and Reynolds, rather than from the defendant. One essential element of a price squeeze is monopoly power in the raw material. *See United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). Therefore, it appears to

be a significant extension of the price squeeze doctrine to predicate antitrust liability on such a basis in a case in which the defendant is not selling the raw material in question to the plaintiff and there is no evidence of any conspiracy between defendant and the other suppliers of the raw material.

Each of these important issues would appear to warrant further attention by the entire Court.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

Sally Mrvos
Clerk

Mr. Michael E. Kunz, Clerk
U.S. District Court
Eastern District of PA
2609 U.S. Courthouse
Phila., PA 19106

July 1, 1986

Re: Bonjorno, Joseph A., etc., et al. Appellants in No. 83-1047 vs. Kaiser Aluminum & Chemical Corporation, etc., etc., Appellants in No. 83-1079
(D.C. Civ. 74-122)

Dear Clerk:

Enclosed is a certified copy of the judgment in the above-entitled case(s), together with copy of the opinion. The certified judgment is issued in lieu of a formal mandate and is to be treated in all respe cts as a mandate.

( ) We return herewith the certified record in the case(s).

(x) We release herewith the certified list in lieu of the record.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,

/s/
Chief Deputy Clerk
Direct Dial 597-3135

sa
Enclosure
cc: Michael M. Baylson, Esq.
Richard P. McElroy, Esq.

P.S. To the Clerk of the District Court Also enclosed are the following:

1. Certified copy of the Order dated July 1, 1986
2. Certified copy of Stipulation.

United States Court of Appeals
FOR THE THIRD CIRCUIT

Nos. 83-1047 & 83-1079

BONJORNO, JOSEPH A., KERR, GEORGE M.,
and CLISBY, BARBARA K., as Transferrees
in Liquidation and Dissolution of
Columbia Metal Culvert Co., Inc.,
Appellants and Cross-Appellees

vs.

KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.
ROBERT A. KENNEDY and
KENNEDY CULVERT & SUPPLY COMPANY and
ROBERT KENNEDY
Kaiser Aluminum & Chemical Corporation and Kaiser
Aluminum & Chemical Sales, Inc., *Appellees and Cross-Appellants*

(D.C. Civil No. 74-0122)
ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered January 18, 1983, which granted in part the defendant's motion for a judgment n.o.v. be and the same is hereby reversed. It is further ordered and adjudged that the judgment of the said District Court entered January 18, 1983, be and the same is hereby vacated and the cause remanded to the said District Court which is directed to reinstate the judgment entered December 4, 1981, which is affirmed. Costs taxed in

favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court.

ATTEST

/s/ Sally Mrvos
Clerk

December 27, 1984

Nos. 83-1047 & 83-1079

Certified as a true copy and issued in lieu of a formal mandate on July 1, 1986.

Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Costs taxed in favor of aplt./crs. appee as follows:

Briefs and Appendix $3,120.00

INTEREST ON JUDGMENTS IN FEDERAL LITIGATION

28 U.S.C. §1961

Curtis R. Reitz
Algernon Sydney Biddle Professor of Law
University of Pennsylvania

October 1986

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INTRODUCTION

The purpose of this paper is to explore the law and the rationale for the law regarding awards of interest on judgments for money in federal litigation. I have been studying developments in the law of interest recovery for some time. At the request of counsel for plaintiffs in *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, No. 74-122, now pending in the United States District Court for the Eas ern District of Pennsylvania, I undertook to present, in this paper, the results of my study as they apply to interest on judgments under federal law.[1] Although I have been retained as a consultant, the views expressed are entirely my own.

Much recent ferment has occurred in the law regarding interest on judgments, a subject once marked by stolid inertia and lack of significant controversy. Present federal law regarding interest on judgments is in a state of disarray. The law has developed in a fragmentary way which has tended to obscure the policies animating awards of judgment interest to successful litigants. However, an examination of existing law in light of these fundamental policies reveals a consistent, coherent, and principled approach to issues of interest on judgments in cases of varying procedural complexity.

The primary purpose of interest on judgments is to accomplish the restitutionary goal that neither party to litigation shall obtain benefits or suffer losses because of the time required for litigation to run its course. The elementary economic fact is that money has time-value. The time value of money associated with periods of litigation inures to the benefit of defendants. Plaintiffs incur reciprocal losses. A fundamental legal policy of long-standing duration held that judgment debtors should be required to surrender the benefits derived from delay in performance of their monetary obligations and that these sums should be awarded to plaintiffs. Effectuation of that public policy became more important and more complex as the time value of money soared in the past fifteen years.

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1. In the ongoing study, I have been considering pre-judgment interest and interest on judgments in state and federal law.

In the past, the law assessed the cost of delays between verdict and payment by reference to "legal" rates of interest, representing the highest non-usurious rates applicable to marketplace transactions. A remedy so measured adequately compensated successful parties for litigation delays in an era of low, stable interest rates. However, in the present climate of high interest rates, low rates of interest deny successful litigants full compensation and encourage unsuccessful parties to prolong the period between verdict and payment of damages.

The current federal statute governing awards of interest on judgments, 28 U.S.C. §1961, allows judgment interest at rates of interest found in the marketplace. This statute, amended in 1982, was intended to provide more adequately for compensation to successful litigants. Its proper application depends upon principled analysis of three questions:

1. In extended litigation, what judgment determines that interest is properly allowable (*i.e.*, what event in the litigation triggers the "vesting" of what previously was only an "inchoate" right)?
2. For what period of time is interest to be allowed?
3. What is the rate at which interest is to be awarded?

As to the first question, interpretation of §1961 and a related procedural rule (FED. R. APP. P. 37) demonstrates that interest becomes properly awardable on the issuance of that judgment which concludes the litigation on the merits. Until such a judgment is rendered, a litigant is invested with no right to recovery and hence no right to receive compensation for the time value of his award. Entry of the ultimate judgment appropriately determines the law under which a litigant's rights to interest are measured.

With respect to the issue of the period over which interest is awardable, the statute and applicable precedent demonstrate that an award of interest may (and frequently does) antedate the judgment in which a successful litigant's right to interest is established. To fully effect the restitution function of interest on judgments, such interest begins to accrue from that point where the amount of a litigant's damages has been fixed and is no longer subject to any adjustment for time value of money.

Finally, on the issue of the proper rate at which interest on judgments is awarded, 28 U.S.C. §1961 contemplates that a court refer to the Treasury bill rate in effect at the time interest begins to accrue. The rate thus determined applies to all interest due the successful litigant, and interest is compounded annually. The present version of 28 U.S.C. §1961 became effective on October 1, 1982. Conflict has arisen over how that statute applies to litigation under way on the effective date of the statute and concluded thereafter. Sound policy considerations and precedent support application of the current statute to judgments entered after October 1, 1982, even though part of the proper period of interest accrual came before that date.

I. TIME VALUE OF MONEY, INCONSTANT DOLLARS, AND THE LAW

A. Introduction

The primary judicial remedy in the Anglo-American legal system is the money judgment. Prevailing plaintiffs in actions for this remedy establish that a cause of action ripened on a date before the commencement of litigation. Typically, the basic amount fixed in a money judgment is the amount due as of the time that the cause of action ripened. Litigation is inevitably time consuming. The date when the litigation process establishes the amount of money due will be later, and sometimes will be very substantially later, than the date on which the cause of action ripened. Much further delay is likely before the litigation process concludes and the judgment can be executed. A major corollary branch of the law of remedies takes into account the effect, on the relief to be granted, of the lapse of time between the date that a legal obligation ripened and the date on which that obligation is finally met.

Transformation of a matured claim for monetary relief to a specific sum of money paid in satisfaction of adjudicated liability, given the time requirements, poses a fundamental policy question: how shall the economic consequences resulting from passage of time consumed by litigation be distributed between the parties? The overall answer has been to adjust the amount to

be paid on payment day in accordance with the basic tenets of restitution, the most elementary principle of the law of remedies. Any obligor benefits from delay in performing the obligation to pay a sum of money. Defendants necessarily receive the benefits of delay. Conversely, plaintiffs suffer loss from delay in receiving sums of money. Sound policy regarding distribution of economic consequences has been to require defendants to surrender benefits received and to compensate plaintiffs for losses incurred by the delay in obtaining money due.

During the past two centuries, the law developed, in piecemeal fashion, to vindicate the policy judgment that defendants should disgorge to plaintiffs benefits obtained by delay in payments. Complementary bodies of law emerged to adjust the nominal amounts of plaintiffs' claims in accordance with the restitution objective. One adjustment occurs in the fact-finding function, which attempts to fix the amount of the money to be recovered in values current at that time. The primary method for doing so is the inclusion of so-called pre-judgment interest in a fact-finder's statement of the amount then due. The second adjustment centers on the time, after the fact-finding function has closed, until a defendant ultimately satisfies a judgment by payment. This adjustment adds interest on the principal sum of the fact-finder's determination. This secondary adjustment is dealt with under the law of interest on judgments, sometimes called post-judgment interest.

The fragmentary nature of the legal developments and their interpretation obscures at times the clear and compelling policy that underlies the network of remedial doctrines. The pattern consists partially of common law, created case-by-case over time by courts deciding specific controversies. Other parts of the larger scheme are statutory. Proper application of any part of the laws in this area is made more understandable by placing any specific question in the context of the larger purposes and policies of the law.

Historically, legal documents occurred within a general sense of the restitutionary principle, but without overt recognition of how a particular remedy fitted into a larger scheme. Past failures to focus on the issues more comprehensively may be

explained in part by the relatively minor amounts at stake in transforming past values of monetary obligations to present value. The principal sums in question in litigated cases were the predominant concern. In more recent years, that relationship has changed dramatically. The adjustments necessary to take into account the consequences of passage of time on the value of a sum of money have become one of the most important aspects of remedial law. More than ever before, the need is manifest to see comprehensively the framework for the questions presented and to handle intelligently the application of statutory and common-law rules in particular controversies.

Before considering these legal developments, it is useful to review the fundamental economic forces that determine the time value of money and the extraordinary scale of recent changes in that value in the marketplace. The sharp rise in the time value of money in the "real world" etches new importance on judicial remedies intended to take account of the time value of money.

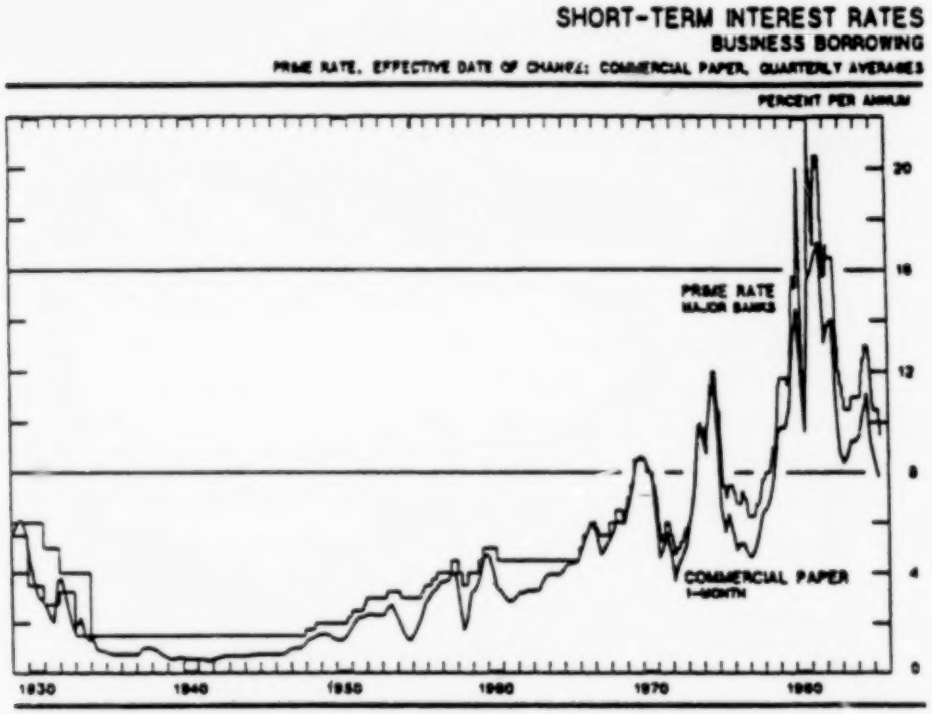
B. A Look at the Marketplace

During the last decade and a half, the time value of money in the marketplace soared to unprecedented high levels. Time value of money is reflected in the various rates of interest charged by lenders and paid by borrowers in voluntary transactions. High interest rates continue to be a major concern on the governmental agendas of the President, the Congress, and the Federal Reserve Board. Current sluggishness in growth of the United States economy is widely attributed to this factor. High interest rates vitally affect businesses and individuals in their use of credit. Despite the recent success in controlling inflation, real interest rates remain extremely high relative to the experience of the past.

The history of two common credit transactions, involving short-term borrowing by business entities, reveals the precipitousness of the recent rise in the time value of money. Lending institutions charge their customers varying rates of interest on short-term line-of-credit loans. The so-called prime rate is that

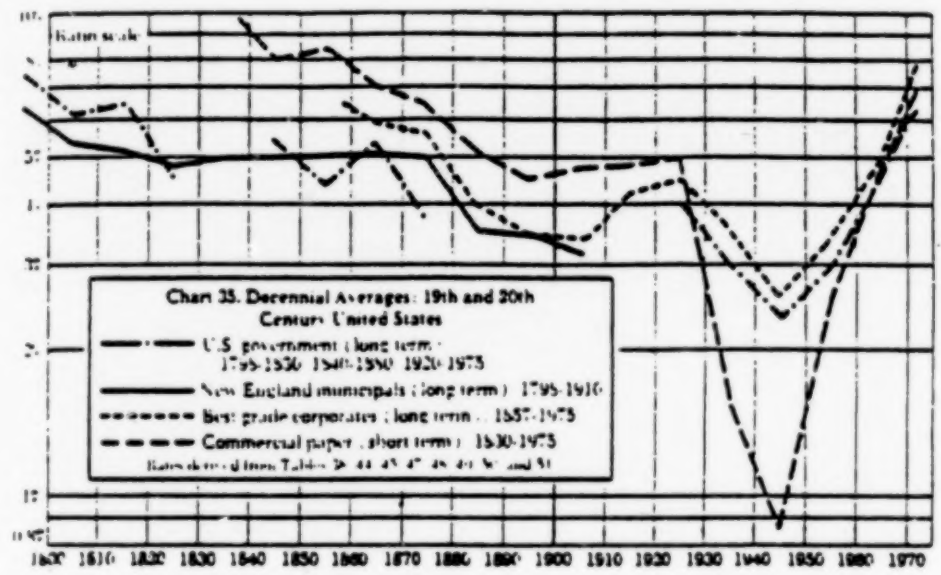
used by a bank with its most creditworthy business borrowers, usually major corporations. Prime rates serve as a basic yardstick for determining rates for less creditworthy business borrowers, who are charged and pay a stipulated number of "points over prime." Business entities also borrow by selling commercial paper, loans of a fixed but short-term duration. The rate of interest paid in commercial paper transactions is another indicator of time value of money. Aggregate data on prime rates and commercial paper rates are collected, averaged and published to show changes in time value of money over periods of time.

The following chart, published by the Federal Reserve Board, shows the levels and the movement of prime rates and commercial paper rates since 1930. The extraordinary peaks in the late 1970's and early 1980's reflect an economic cataclysm that still wracks the economy.



Source: Federal Reserve Board, 1985 Historical Chartbook 99

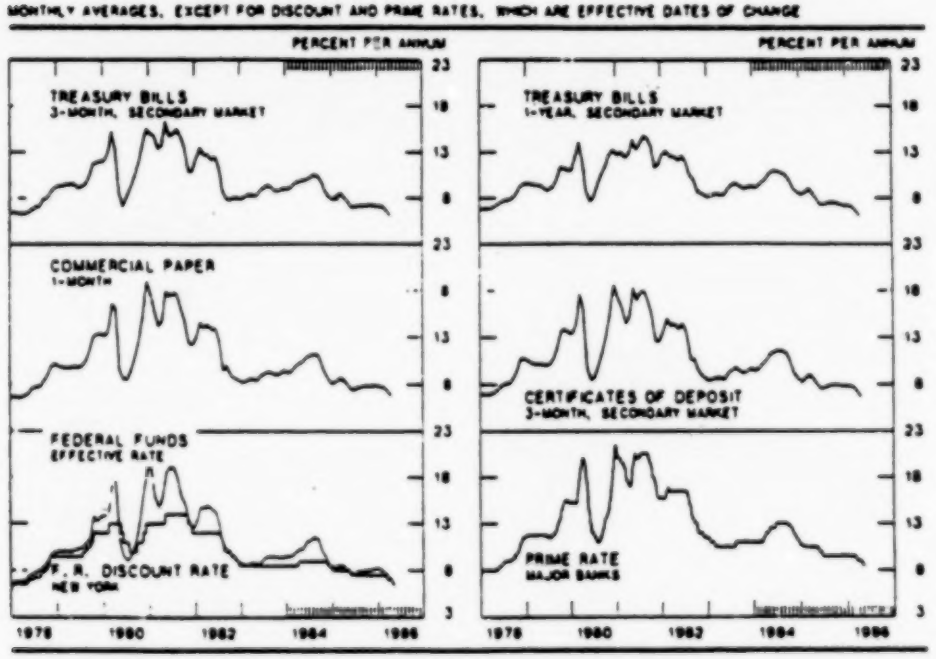
The general pattern of rates evident in the Federal Reserve Board's Historical Chartbook has been traced back well before 1930. The authoritative historian of interest rates, Winslow Homer, compiled the following 200-year chart of rates on a number of long-term and short-term credit transactions, including short-term commercial paper from 1830 to 1975.[2]



2. *See* W. Homer, A History of Interest Rates 339 (2d ed. 1977).

For the most recent decade, the Federal Reserve Board publishes monthly a more detailed chart of interest rates, showing the major banks' prime rates and the rates on commercial paper, together with rates applicable to certificates of deposit (borrowing by banks) and three federal credit transactions.

SHORT-TERM INTEREST RATES



Source: Federal Reserve Board, Chartbook 72 (May 1986).

The data reported on nominal interest rates reflect the time value of money at the dates indicated and the changes in the time value of money from time to time. It should be evident that the changes reported, particularly the extreme heights experienced in the past fifteen years, represent a reaction in part to the shrinking purchasing power of a dollar. If, due to price inflation, the purchasing power of a dollar is declining, the time value of money takes into account that debts will be paid in dollars worth less than the dollars borrowed. The decline in the purchasing

power of a dollar with respect to purchases by business entities is reported in the following table:

PURCHASING POWER OF THE DOLLAR: 1940-1986

(Obtained by dividing the average producer prices index for the 1967 base period ($1.00) by the producer prices index for a given period.)

1948	$1.252	1967	1.000
1949	1.289	1968	.972
1950	1.266	1969	.938
1951	1.156	1970	.907
1952	1.163	1971	.880
1953	1.175	1972	.853
1954	1.172	1973	.782
1955	1.170	1974	.678
1956	1.138	1975	.612
1957	1.098	1976	.586
1958	1.073	1977	.550
1959	1.075	1978	.510
1960	1.067	1979	.459
1961	1.067	1980	.405
1962	1.064	1981	.371
1963	1.067	1982	.356
1964	1.063	1983	.351
1965	1.045	1984	.343
1966	1.012	1985	.340

Source: Statistical Abstract of the United States 1986; Survey of Current Business (March 1986).

This table shows, for example, that a payment of $100 in 1985 to satisfy the principal of a $100 obligation incurred in 1967 would mean that, in real value, a $34 payment satisfied the $100 debt. The marketplace does not allow such a phenomenon to occur. Nominal rates of interest adjust so that a creditor receives, in more or less constant dollars, both the principal of

the debt and a return for the use of the money by the debtor during the credit period.

Marketplace rates of interest are the proper source to consider in measuring the judicial remedies that take into account the time value of money. The restitution principle that calls for defendants to give up benefits received by delays in performance of monetary obligations refers to benefits obtained or obtainable in the marketplace. Likewise plaintiffs' losses, suffered by reason of delays in the performance of monetary obligations, are losses measured basically by marketplace costs. Delay in performance of a monetary obligation is, in a real sense, an involuntary loan by plaintiff to defendant. Marketplace indicators of the time value of money provide, therefore, the best source for determining the legal measure of recovery for these involuntary loans.

C. Legal Remedies for Time Lapse: An Overview

Remedial law takes account of the reality that money has time value at two key points in the unfolding of litigated cases. The first usually occurs at the end of the fact-finding process when the dollar value of a plaintiff's claim is fixed by verdict or court finding. The second occurs when a defendant pays a final judgment. At these two points, and only at these points, recognition is given to the time value of a sum of money.

In litigation that results in a money judgment, one fact-finding goal is to express the amount of a plaintiff's claims in terms of present value. The gravamen of plaintiffs' claims tend to be losses incurred, obligations dishonored, or rights invaded at an earlier time. Typically, fact-finders measure the value of those claims as of the time they ripened and, as a corollary remedy, add an additional amount to adjust for the time value of money from the historical events to the dates of decision. The added amounts of the corollary remedy for time value of money are commonly called pre-judgment interest. More accurately,

that corollary remedy would be designated as pre-verdict or pre-finding interest.[3]

Litigation does not end with a jury verdict or court finding that determines the amount a defendant then owes to a plaintiff. In theory, a defendant might promptly pay the specified amount, but litigation runs its course to judgment. In jury trials, the post-verdict stage of further proceedings in the trial court may be extensive: consideration of motions for new trial, motions for judgment notwithstanding the verdict, and more. Bench trials, too, may involve additional proceedings prior to final judgment in the trial court. Moreover, frequently, trial court judgments are appealed, with sometimes more than one level of appellate review. Post-verdict or post-finding proceedings may take years, during which time the amount determined to be due by the fact-finder usually remains unpaid. Ultimately, final trial court judgments are entered after all issues have been revolved.

When defendants eventually pay these final judgments (or when the judgments are executed), the second adjustment is made to take account of the time value of the money defendants are legally obligated to pay plaintiffs. Starting with the amount

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3. In the past, courts generally declined to award pre-judgment interest in cases where the amount of a plaintiff's principal claim was uncertain prior to verdict or court-finding. The rationale usually given was the supposed unfairness to a defendant who could not stop the accrual of interest liability by payment into court of the contested amount or by some comparable pre-verdict act. This rationale is not valid. A defendant, concerned with the risk of accrual of interest, could pay into court the amount defendant believed to be involved. *See, e.g.* FED. R. CIV. P. 67. More fundamentally, lack of certainty as to the amount of the verdict or finding during the pendency of a claim does not diminish the plaintiff's reciprocal loss.

The historic reticence of courts to allow pre-verdict or pre-finding interest on claims uncertain in principal amount is rapidly disappearing. The effect of refusing a corollary remedy for the time value of money had its greatest impact in personal injury/property damage tort cases. Increasingly, courts now declare that tort plaintiffs are entitled to pre-verdict or pre-finding interest. *See, e.g.*, PA. R. CIV. P. 238.

Further discussion of this issue in the context of interest on judgments appears in the text at notes 34 to 36.

fixed by the fact-finder as the principal sum, remedial law adds interest on the judgment, commonly called post-judgment interest.

The second decision point for taking into account time value of money differs from the first in that, ordinarily, no institutional fact-finder like a jury or trial court is available to act. Interest on judgments is usually calculated by the parties and confirmed by court clerks' decisions to mark judgments "satisfied." The parties and clerks are guided by standard interest calculation formulae established by law.

For interest on judgments, the legal remedy developed to take account of the time value of money uses a standardized measure of the amount of recovery rather than a case-by-case inquiry into the provable benefits derived by a defendant or the provable loss suffered by a plaintiff. The solution has been a statutorily set rate of interest that applies to judgments generally.[4]

Historically, the rates of interest adopted by statutes were the highest rates permitted by usury laws in consensual transactions, often called "legal rates" of interest. As a result, the restitution remedy in the past was generous in relation to marketplace rates.[5] "Legal rates" tended to be 6% or higher, a

4. Pre-judgment interest is taken into account before the fact-finding process has closed, but even here there was a tendency to use a standardized measure of the adjustment required to take account of the time value of money. *See, e.g.,* U.C.C. §3-122(4); RESTATEMENT (SECOND) OF CONTRACTS §354 & comment a (1981). After market rates of interest had escalated to extraordinary levels, plaintiffs began to introduce evidence of their losses as part of the injuries for which they sought relief. Courts then faced the somewhat novel question of having to choose between the traditional standard measures of relief and the measures indicated by vivid losses suffered by plaintiffs. *See, e.g.,* Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co., 697 F.2d 481 (2d Cir. 1983). *See also* Keir & Keir, *Opportunity Cost: A Measure of Prejudgment Interest,* 39 BUSINESS LAWYER 129 (1983).

5. When pre-judgment interest was set by marketplace measures, the result was a substantial step-up in the applicable rate of interest when the period of pre-judgment interest ended and the period of interest on a judgment began. *See, e.g.,* Chemical Bank & Trust Co. v. Prudence-Bonds Corp., 213 F.2d 443 (2d Cir. 1954). For a time, when marketplace rates had moved far above statutory rates, a substantial step-down in the applicable rate of interest occurred. *See, e.g.,* Peterson v. Crown Financial Corp., 553 F. Supp. 114 (E.D. Pa. 1982) (pre-judgment rate fixed at 2½% above the prime rate of interest).

rate substantially above those tracked by Professor Homer in his historical study of interest rates in voluntary transactions. The legislative choice for most of the history of interest on judgments was to use a standardized measure of the restitution remedy that exceeded rates of interest paid by the most creditworthy businesses in voluntary transactions.

As marketplace circumstances changed and interest rates soared, the statutorily set rates of interest became anachronistic and, indeed, pernicious.[6] During the past decade, virtually every legislature acted to amend its provision for interest on judgments to fix rates of interest on judgments attuned to the changing values of money in the marketplace.

Successful implementation of the restitutionary objective that amounts recovered in litigation should be adjusted for the time value of money, with utilization of current monetary values being applied to effect the adjustments at two points in the litigation, is as illustrated in a recent celebrated federal case.[7]

Years of litigation elapsed as the case moved through the District Court for Delaware, the Court of Appeals for the Third Circuit, and the Supreme Court. Two key decisions, one at the end of the fact-finding stage and one at the time of payment,

6. The dramatic rise in marketplace rates of interest in the 1970s not only moved those rates above the fixed rates used for remedial purposes, but moved them far above. On any rational economic calculus, the benefit of postponement of payment of monetary obligations, subject to low legal rates of interest, would induce defendants to extend litigation to its utmost. The United States Court of Appeals for the Second Circuit took notice of the differential between marketplace interest rates and legal interest rates in sharp rebukes to defendants for pursuing meritless appeals. Bankers Trust Co. v. Publicker Industries, Inc., 641 F.2d 1361, 1367 (2d Cir. 1981); Brady v. Chemical Construction Corp., 740 F.2d 195 (2d Cir. 1984).

7. For reported decisions, *see* Devex Corp. v. General Motors Corp., 494 F. Supp. 1369 (D. Del. 1980), *aff'd,* 667 F.2d 347 (3d Cir. 1981), *aff'd,* 461 U.S. 648 (1983), *on remand,* 569 F. Supp. 1354 (D. Del. 1983), *aff'd,* 749 F.2d 1020 (3d Cir. 1984), *cert. denied sub nom.* Technograph, Inc. v. General Motors Corp., _____ U.S. _____ 106 S. Ct. 68 (1985), *on remand,* Civil Action Nos. 3058 CMW, 83-567 CMW (D. Del. June 27, 1986).

accomplished the remedial purpose. The former brought the historic .ue of plaintiff's claim to present value as of the initial court finding for plaintiff. The latter carried the value set by the fact-finding decision forward to the date of defendant's payment of the judgment.

The first decision, the fact-finding decision, established in 1980 that General Motors, having infringed plaintiff's patent, owed imputed royalties of $8,813,945.40. The amounts so fixed were historic values, as of the dates of infringing use. The District Court added $10,912,291.15 to reflect the historic value of plaintiff's royalty claim in present values. *Devex Corp. v. General Motors Corp.*, 494 F. Supp. 1369 (D. Del. 1980). The litigation did not end. Proceedings in the Third Circuit and the Supreme Court consumed additional years. The Supreme Court's decision confirmed the District Court's measure of the time value of the money at stake up to the fact-finding decision. After challenges to the District Court's fact-finding decision had been resolved, the amount of General Motors' obligation was increased by the time value of money on the amount found due in 1980 through the date of payment.[8] The District Court accomplished this by adding interest on the judgment. *See Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1022 (3d Cir. 1984). The total recovery on a base claim of $8.81 million, after the two adjustments of the corollary remedy, as $27 million.

The *Devex-General Motors* litigation reflects well the operation of the remedial principle of restitution in an extended

8. The District Court's 1980 finding of the present value of plaintiff's claim was formulated to include a *per diem* amount to be added for each day between the date of the Court's calculation of the amount presently due and the date of entry of judgment in the District Court. This assured that the two periods of adjustment, from claim to findings and from judgment to payment, would meet without gap. *See also* Ashland Oil Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) (pre-judgment interest ordered to date of district court's second fact-finding decision, the first having been vacated on appeal; interest on the judgment to begin at that point).

controversy of major proportions. The two, back-to-back adjustments effected the basic goal that the outcome of litigation should be shaped so that neither party gains or loses as a result of the lengthy time period required for cases to reach an end.

II. Federal Remedies for Delay in Reaching Judgment Day

Federal law follows the remedial pattern of adjusting the nominal amount of money recoveries to take account of the time value of money through awards of pre-judgment interest and interest on judgments. The primary concern of this paper is the latter adjustment. As will appear, federal courts grant interest on judgments so that the amount recovered by plaintiffs are adjusted to take into account the time value of money associated with the periods of time required for litigation to run its course. Determinations regarding interest on money judgments cannot be made until all controverted questions on the underlying merits-claims have been resolved. When those determinations are made, in the ultimate controlling judgments, federal courts tend to allow interest on the judgments to accrue from the point in a case history where accrual of pre-judgment interest or other method of time valuation of the amount of recovery ends. In a myriad of procedural settings, the basic result achieved in the *Devex-General Motors* litigation is effected.

A. Pre-Judgment Interest

When fact-finding determinations are made in federal question cases, federal common law provides the standards and criteria to be applied so that those determinations can be expressed appropriately in present value amounts. For some federal question claims, statutes prescribe the addition of pre-judgment interest but no statute broadly addresses pre-judgment interest in federal question litigation.

Private antitrust litigation, for example, has been governed by common-law doctrines regarding pre-judgment interest. Pre-judgment interest was not allowed in treble damage actions

instituted before 1980, but the Clayton Act now allows pre-judgment interest on actual damages if the court finds that defendant or its counsel engaged in dilatory tactics. 15 U.S.C. §15(a) (1982). Interest on the full amount of the trebled damages is recoverable under the law concerning interest on judgments.

B. Interest on Judgments

(1) Statutory and Rule Provisions

A broadly applicable federal statute addresses the recovery of interest on judgments in all federal question cases. The federal statute, found in §1961 of the Judicial Code, is supplemented by a provision of the Federal Rules of Appellate Procedure, Rule 37, which illuminates the nature of the statutory remedy and addresses the relationship of trial and appellate courts in the implementation of the award of interest on judgments.

The statutory provision, 28 U.S.C. §1961 (1982), provides in pertinent part:

> §1961. Interest
>
> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

As amended in 1982,[9] this provision responds to the dynamic nature of the time value of money in the marketplace. A flexible rate, ascertainable month by month in accordance with a specified kind of market transaction, assures that rates for interest on judgments reflect changes in time value of money. Congress was very conservative in its choice of the index transaction-type: short-term borrowings by the most creditworthy of all debtors, the United States Government. The Government invariably pays less than other borrowers for the use of money. Section 1961 thus assesses interest on judgments at rates probably below the marketplace rates that would be found in loans to ordinary private business entities.

The statute reflects the marketplace by providing for compounding of interest. Again, the congressional choice was a conservative one. In the marketplace, interest on private loans is compounded at least on a monthly, and often on a daily basis. Under §1961, a judgment fully paid within a year bears only simple interest. Annual compounding thereafter is favorable to judgment debtors.[10]

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9. The Judicial Code provision for interest on judgments can be traced to 1842, when Congress first declared that "interest shall be allowed on all judgments in civil causes." 5 Stat. 518. The 1842 statute indexed the recovery of interest on judgments in federal courts to the rate allowed under the laws of the various states in which the federal courts were located. The original statute was carried forward through various revisions of the Judicial Code. *See, e.g.*, Revised Statutes §966 (1873); 28 U.S.C. §811 (1940). In April 1982, Congress adopted the current version, 28 U.S.C. §1961 (1982). Pub. L. No. 97-164, Title III, §302(a) 96 Stat. 55 (1982).

10. The Director of the Administrative Office of the United States Courts, complying with the instructions in §1961, distributed a series of notices on the enforcement of that section. Copies are attached as an appendix to this paper.

In addition to setting rates of interest on judgments by reference to marketplace rates, the 1982 amendment established a remedy to be applied uniformly across the country. Prior to 1982, federal statutes on judgment interest incorporated by reference rates of interest established by state law in the respective states in which federal courts were located. State legislatures had responded to the precipitous rise in time value of money in different ways and at different times. The sharp divergence of interest rates thereby incorporated into federal law[11] was a major reason for amendment of §1961.[12]

Rule 37 of the Federal Rules of Appellate Procedure, adopted in 1967, elaborates on the remedy declared in §1961. The rule comes into play only when civil cases involving money judgments have been decided by a court of appeals, but the issues of interest on judgments frequently arise in that setting. The rule provides in its entirety:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

A comparable rule is found in the Rules of the Supreme Court, Rule 56.

(2) Federal Remedies As Applied in Cases That Move Promptly to Judgment Day

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11. Within the Third Circuit, for example, Delaware amended its provision for judgment interest in 1980 to set a rate interest 5% over the Federal Reserve discount rate, including any surcharge, as of the time from which interest is due. DEL. CODE ANN. tit. 6, §2301(a) (Supp. 1984). In the *Devex-General Motors* litigation, the judgment interest rate under the formula was 16%. Pennsylvania, on the other hand, allows interest on judgments at the rate of 6%. 41 PA. CONS. STAT. §§201, 202 (Supp. 1986); 42 PA. CONS. STAT. §8101 (1982). The Pennsylvania rate of interest has been unchanged since 1723. *See* Note, *The Post-Judgment Interest Rate in Pennsylvania: Ignoring Reality Too Long*, 23 DUQUESNE L. REV. 1083 (1984).

12. *See* notes 44 and 45 *infra*.

The application of §1961 to an ordinary case, one not complicated by significant delay after the fact-finding decision, is quite straightforward. An appropriate pre-judgment interest award is incorporated into the verdict or finding at the conclusion of the evidentiary hearing. A district court judgment is entered forthwith.[13] The judgment declares formally the amount defendant is obligated to pay. The judgment becomes enforceable by execution after ten days.[14] During that ten-day period, and thereafter until the judgment is paid, interest on the amount of the judgment accrues under §1961.

The remedial scheme is of such clarity on the face of the statute that no additional interpretation is required in cases that follow the simple model. This basic model reveals how the law achieves the underlying remedial objective. The outcome effects the restitutionary purpose of taking account of the time value of money for the period between ripening of a plaintiff's claim and arrival of the day when that claim is paid.

III. APPLICATION OF FEDERAL REMEDIES IN CASES OF EXTENDED DURATION

In much litigation, cases are far from ended when jury verdicts are returned or court findings are made. As the course of litigation stretches out from that point, putting off entry of the ultimate final judgment, the question arises of the remedy for the time value of money during the time consumed by further litigation. The most frequent cause of lapse of substantial time is the slow cadence of appellate review. Appellate process unfolds in stages of considerable length even if only one level of appeal is involved. Should Supreme Court intervention be sought, many years elapse between verdict or finding and ultimate final judgment. Even without any appeal, proceedings after verdict or finding in a district court may result in a gap between the fact-finder's determination and the trial court's judgment.

The central question is the nature and extent of the remedy under §1961, illuminated by Appellate Rule 37, for the time

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13. *See* FED. R. CIV. P. 58

14. FED R. CIV. P. 62

value of money gained and lost during an extended period of litigation after verdict or finding. The issues arise, of course, only if a plaintiff—at the end of the whole process—is held to be entitled to a money judgment. Once the ultimate judgment is entered, a plaintiff is entitled to interest on the amount of that judgment until it is paid. The question posed here is whether plaintiff is also entitled to adjustment of the amount of that judgment for the period from the fact-finder's determination, by verdict or finding, to the ultimate judgment. Does interest accumulate for the time that elapses as district court proceedings go forward and appeals run their course?

The restitution principle provides an unequivocal affirmative answer to the question. After the fact-finding inquiry closes, the amount of a plaintiff's merits-claim is fixed. Further lapse of time before payment results in defendant being enriched while plaintiff incurs loss measured by the time value of the money. The only remedy for this period is interest on the judgment. The question of a remedy for the period between a fact-finding determination and the ultimate judgment is, in theory, present in every case. In one simple model, when a district court's final judgment follows immediately after verdict and no appeal is taken, there may be no gap at all. As litigation becomes more complex, however, the time periods grow and the amounts of money at stake become more than *de minimis*. In extended cases, the amounts of interest for this period may eclipse the amount of a plaintiff's underlying claim. This part of the paper addresses the extended case, the cases where the greatest adjustments may be required.

The prototypical extended case is one in which a plaintiff reaches an ultimate legal victory on the merits-claim (a) when a court of appeals affirms a lower court judgment for money, or (b) when a court of appeals vacates an erroneous trial court judgment and instructs the trial court to enter a new money judgment for plaintiff. Most of the cases that have presented issues of the remedy for extended litigation are based upon the delays inherent in appellate review. Some cases, however, become extended in the district courts, when post-trial motions remain open for decision for substantial periods of time. The

most protracted cases are those that combine lengthy appellate review with lengthy trial court consideration of post-trial motions.

In federal court, extended litigation poses three questions of construction of §1961 and appellate Rule 37.

(a) Section 1961 provides that interst be "allowed on a money judgment." In extended litigation, which judgment determines that interest is to be allowed?

(b) For what period of time is interest to be allowed? Does the statute allow the period to begin before the controlling judgment is entered?

(c) What is the rate of interest used where the period of interest accrual begins before the controlling judgment?

The first two questions, which are interrelated, are addressed in Part A. Part B considers the question of the rate of interest to be applied.

A. "Allowance" of Interest: Time Periods Covered

(1) Power to Allow Interest: The Statute and Rule

The language of §1961 is not free from ambiguity, but the statute, construed in light of Rule 37 and its manifest remedial purpose, clearly allows plaintiffs who ultimately prevail in actions for money judgments to recover interest on those judgments for time consumed during extended litigation.

In extended litigation, inevitably multiple judgments are entered. Section 1961 does not, on its surface, speak clearly to the question of interest when more than one judgment has been entered in a case. Earlier judgments of a district court are superseded by later judgments of that court. Judgments of appellate courts, affirming, reversing, or modifying district court judgments, add to the sequence of judgments. As cases move from stage to stage, past judgments no longer have force and effect. Well-defined procedural law deals with the suspension and vacation of prior judgments as litigation moves along.[15]

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15. Pending a final outcome, execution of a judgment not vacated can be and normally is stayed as litigation proceeds. *See* FED. R. CIV. P. 62; FED. R. APP. P. 8

Which of the several judgments entered during the course of extended litigation triggers the operation of §1961?

The statute declares that interest shall be allowed "on any money judgment in a civil case recovered in a district court" and that "such interest shall be calculated from the date of the entry of the judgment." In the context of extended litigation, the judgment signified by "any money judgment" is a judgment at the conclusion of the litigation. Until all questions as to defendant's liability on the merits-claim, or as to the amount to be recovered on that claim, have been resolved, a "correct" judgment for the proper amount against the proper defendant may not ever have been entered in any court. All intermediate judgments may have been infected by some error. Intermediate judgments are not final in the sense that execution of those judgments is timely. While extended litigation moves along, earlier judgments are changed, vacated, or superseded by later judgments. Until no further changes in the underlying merits-claim issues are expected, it is premature to consider adding interest on any judgment.

Rule 37 of the Rules of Appellate Procedure confirms that the ultimate judgment of a court of appeals, at the end of litigation prolonged by appeal, controls the allowance of interest. Prior to adoption of the Rules, failure of a court of appeals to include instructions as to interest in its mandate was tantamount to denial of interest on the judgment to the date of the appellate court's judgment. *See, e.g.*, Note, *Interest on Judgments in the Federal Courts*, 64 YALE L.J. 1019 (1955). Rule 37, adopted in 1967, corrected perceived problems in that body of decisions.

The first sentence of Rule 37, dealing with a court of appeals' affirmance of a district court judgment for money, provides for inclusion of interest during the period of appeal. The Advisory Committee's Notes state that the first sentence is intended to clarify "some confusion on this point" in prior cases.[16] The substance of the first sentence is a standing term,

16. For a more extensive discussion of the confusion among the courts, *see* Note, 64 YALE L.J. 1019, 1022-1029 (1955).

incorporated into every mandate in cases of this nature, directing that interest be allowed for a period prior to the court of appeals' judgment.

The second sentence applies whenever a district court judgment is modified or reversed with a direction that a money judgment be entered. In this procedural setting, the Rule requires, in every case, that the court of appeals issue instructions with respect to allowance of interest for the preceding period of time. In 1948, the Supreme Court had held that where a court of appeals' mandate made no mention of interest for the period of the appeal, even though plaintiff prevailed on appeal, the district court was powerless to add interest for that time. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948). The Advisory Committee Notes to Rule 37 state that the second sentence is "a reminder" of the *Briggs* rule so that courts of appeals will not be silent, but will rather overtly instruct district courts with respect to interest.

Rule 37, in both sentences, confirms that the controlling judgment which confers the corollary remedy of interest for successful plaintiffs, is the judgment of the appellate court bringing the litigation to a close.

In addition to identifying the controlling judment on which interest is allowed under §1961 (and the controlling court), the Rule indisputably indicates that the proper period of interest antedates that controlling judgment. When a district court's money judgment is affirmed on appeal, the first sentence of the Rule provides that interest be allowed from the date of the judgment in the court below being sustained. When a district court's judgment is modified or reversed with direction to enter a money judgment, the Advisory Committee's Notes explain that the court of appeals must instruct the district court regarding interest for the period of appeal from the erroneous ruling of the court below:

> In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the

question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal.

The Advisory Committee's explanation of the Rule refers explicitly to allowance of interest from the date on which a correct district court judgment should have been entered.

This result has been reached by some federal courts by "equitable construction" of §1961.[17] What these courts mean, it appears, is that the "date of the entry of judgment," from which interest begins to accrue, is that date on which a correct trial court judgment should have been entered. The same result could be reached by interpretation of the statute to give effect to its manifest purpose.[18]

(2) Federal Case Law Interpreting the Statute and Rule

(a) *Cases Extended by Appeals*

We turn next to the body of precedents in extended litigation where the issue has arisen regarding a remedy for

17. The general principle of "equitable construction" of the statute is traced to a decision of the Supreme Court more than a century ago. National Bank v. Mechanics' National Bank, 94 U.S. 437, 24 L. Ed. 176 (1877).

Courts have not considered, apparently, an alternative rationale that recovery of interest for the period between the initial decision by a trial court and the ultimate judgment could be characterized as pre-judgment interest, recoverable without reference to §1961.

18. Courts that have relied upon the principle of "equitable construction" of §1961 appear to have been concerned with construction of the third sentence, which provides that interest "shall be calculated from the date of entry of judgment." A superficial reading of "from" would limit interest on judgments to periods after judgments. The "equitable construction" assumes a correct judgment to have been entered on the date that, in the court's view, interest should begin to accrue. One could arrive at the same conclusion by a less superficial reading of "from." Interest on a judgment is a corollary remedy incident to the ultimate merits-claim determination that a plaintiff is entitled to a sum of money. An interest calculation "from" that point could look backward as well as forward.

the time value of money for the period of the litigation after verdict or finding.

All of the federal courts that have decided the issue have construed §1961 and Rule 37 to mean, in extended cases, that the controlling judgment bringing the controversy over the merits-claim to a close is the judgment that establishes the plaintiff's right to interest on the judgment and that the allowable period of interest under §1961 begins before that controlling judgment has been entered.[19]

Federal courts have applied the remedy of judgment interest to varying periods of time so that this remedy extends back to the dates when no further adjustments for time value of money were made on the amounts to be recovered on the merits-claims.

The most considered opinion evaluating plaintiffs' recovery of interest on a judgment is that of the Ninth Circuit in a 1983 case. The Court of Appeals reversed a trial court judgment

19. Case law on these points exists only in decisions of courts of appeals and district courts. The Supreme Court's views are indicated by its promulgation of Federal Rule of Appellate Procedure 37. The Supreme Court granted certiorari to take up the question in Briggs v. Pennsylvania R. Co., 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948). The Court disposed of that case, however, without reaching the question of interpretation of §966 of the Revised Statutes, the predecessor of §1961. The Supreme Court decision went off on the ground that the district court was powerless to add interest on a judgment when the court of appeals, reversing the district court's initial ruling that it lacked jurisdiction, ordered reinstatement of the amount of plaintiff's claim found by jury verdict but did not mention interest in the mandate.

The so-called *Briggs* rule, allocating exclusive power to the court of appeals to allow interest for the period between an erroneous district court decision and the appellate court's reversal, has been incorporated into Fed. R. App. P. 37. The rule requires courts of appeals to make explicit their decisions regarding interest in their mandates to the courts below. Omissions of this interest term may be corrected by timely motions for amendment of the mandate. *E.g.*, Reaves v. Ole Man River Towing, Inc., 761 F.2d 1111 (5th Cir. 1985). Occasionally, a motion to recall a mandate is rejected as untimely. *See, e.g.*, Lee v. Terminal Transport Co., 301 F.2d 234 (7th Cir. 1962); Riha v. International Telephone & Telegraph Corp., 533 F.2d 1053 (8th Cir. 1976); Alexander v. National Farmers' Organization, 614 F. Supp. 745 (W.D. Mo. 1985).

n.o.v. for defendants, and went on to consider the effect of that reversal on plaintiff's right to interest. Holding that interest on the judgment should be allowed from the date of the verdict, the court's reasoning was as follows:

> The purpose of awarding interest to a party recovering a money judgment is, of course, to compensate the wronged person for being deprived of the monetary value of the loss from the time of the loss to the payment of the money judgment.
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> * * *
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> A jury verdict or trial court decision in favor of plaintiff should ordinarily include, as part of the damages award, interest on the monetary loss resulting from the breach or injury from the date of breach or injury to the date of ascertainment of damages, whether such interest be denominated prejudgment interest or interest by way of damages. Where judgment is entered promptly on the verdict, section 1961 ensures that the plaintiff is further compensated for being deprived of the monetary value of the loss from the date of ascertainment of damages until payment by defendant.
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> * * *
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> Where, as here, the initial ascertainment of damages is left standing but a delay occurs between the date of that ascertainment and the date of the eventual entry of judgment based on that ascertainment, the result should not differ. The real issue lurking behind the proper interpretation of section 1961 is, regardless of why a delay exists between the verdict and the entry of judgment based on that verdict, "who should bear the cost resulting from the loss of the use of money."
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> * * *
>
> It would be anomalous to read section 1961 so narrowly that the cost of delay in payment is imposed on a successful plaintiff. We adopt the equitable construction of section

> 1961 suggested by the Supreme Court in *Mechanics' National Bank* [94 U.S. 437 (1876)] and enunciated by the Fifth Circuit in *Pratt* [142 F.2d 849 (5th Cir. (1944))] and its progeny and accordingly hold that plaintiff is allowed interest under Section 1961 from October 6, 1978 [the date of the verdict] until paid.

Turner v. Japan Lines, Ltd., 702 F.2d 752, 756-757 (9th Cir. 1983).[20] The cases allowing interest for the period of extended litigation can be classified into three categories:

First are the cases in which the amount of a defendant's potential liability was settled by verdict or other fact-finding decision and, thereafter, litigation continued to resolve controversy as to defendant's liability. When it was ultimately determined that defendant was liable, the amount of recovery was the amount established in the earlier verdict or judicial fact-finding decision.

Second are the cases in which the amount of a plaintiff's recovery continued in controversy after a judicial determination established defendant's liability. Ultimate resolution of the amount of recovery entailed molding of an earlier verdict or court-finding or use of evidence compiled for that earlier fact-finding inquiry. The common thread in these cases is use of

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20. *Turner* was the culmination of a series of decisions in which the Ninth Circuit interpreted §1961 to take account of the sharp rise in the time value of money. Twenty years earlier, in an extended case, the District Court found for the United States in an action under the Surplus Property Act and awarded $8,000. The Government successfully appealed, establishing the right to recover $159,000. The Government sought interest on the judgment in that amount for a period beginning with the date of the trial court's erroneous award. The District Court refused and the Court of Appeals affirmed. United States v. Hougham, 301 F.2d 133 (9th Cir. 1962). The Court of Appeals recognized that the Government had been deprived of the time value of the money for over four years, but denied relief with the laconic explanation: "The law is not perfect." 301 F.2d at 135. The 1983 opinion in *Turner* describes the *Hougham* opinion as having indicated a preference for "narrow interpretation" of §1961, a preference described as dictum and gently laid aside. 702 F.2d at 755 n.3. The Court of Appeals interred *Hougham* again the following year. Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1299 n.27 (9th Cir. 1984), *cert denied*, _____ U.S._____, 105 S. Ct. 963 (1985).

a measure of the amount of recovery that did not take into account the time value of money associated with the period of extended litigation.

Third are cases in which both defendant's liability and the amount of recovery were controverted through extended litigation with an ultimate conclusion, favorable to plaintiff, measured by factual evidence that did not take into account the time value of money associated with the period of extended litigation. The third category could be considered a variation of the second, in that defendant's liability, while reconsidered, had been substantially established by an earlier judicial determination.

As we shall see, federal courts have concluded generally that interest on judgments should accrue during the period of extended litigation from the date of a significant determination of the amount of recovery or the date on which liability was established or substantially established, if, and this is the critical element, the ultimate judgment does not take into account the time value of money associated with the period of extended litigation in fixing the amount of plaintiffs' recoveries. Not all decisions fit under this broad principle of restitution. The bulk of the litigation has occurred in recent years, as the significance of time value of money become more evident to the parties and to the courts. The most well-considered opinions are entirely from the past fifteen years.

(i) Merits-Claim Liability Established After the Amount of Recovery Had Been Settled

The *Turner* case illustrates one common variant of the pattern of extended litigation in which controversy as to defendant's liability on the merits continued after the amount of potential liability had been settled. The District Court granted judgment n.o.v. for a defendant, an erroneous judgment of non-liability ultimately reversed by the Court of Appeals.

The same pattern exists when a district court enters judgment for plaintiff, defendant appeals, and the trial court judgment is affirmed. The amount of recovery on the merits-claim remains fixed while the defendant's appeal is pending. Adjustment of that amount for the time value of money associated with

the period of appeal can be effected only by allowance of interest on the ultimate judgment from the date of the trial court's earlier decision. The *Devex-General Motors* case illustrates this pattern. The compelling reason to allow interest on a judgment to adjust for benefits and losses on pending appeals, as a matter of restitution, is obvious in this pattern.[21] The first sentence of Appellate Rule 37 explicitly allows interest in every case of this kind. *See also Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984).[22]

Apart from the essentially non-controversial category of cases of appellate court affirmances of trial court judgments for

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21. In some cases, courts of appeals have characterized their actions as "substantial affirmances" of lower court judgments as a reason for granting interest on the periods of time involved in the appeals. *E.g.*, Brooks v. United States, 757 F.2d 734 (5th Cir. 1985); United States v. Michael Schiavone & Sons, Inc., 450 F.2d 875 (1st Cir. 1971). *See also* Kneeland V. American Loan & Trust Co., 138 U.S. 509, 11 S. Ct. 426, 34 L. Ed. 1052 (1891). In *Brooks*, the interest recovery was sought against the United States. Prior to the 1982 amendment of 28 U.S.C. §1961, interest recoveries in suits against the United States were dealt with in other statutes. The law in question in *Brooks*, 31 U.S.C. §1304(b)(1)(A), defined the right to recover and the period for which interest was recoverable in language different from that of §1961. A "substantial affirmance" characterization aided in construction of § 1304(b)(1)(A) to allow interest. In cases governed by §1961 and Rule 37 of the Appellate Rules, a "substantial affirmance" characterization would allow invocation of the first sentence of Rule 37, which might avoid procedual problems under the *Briggs* rule when a court of appeals' mandate had contained no instruction as to interest. Plainly Rule 37's second sentence contemplates allowance of interest when judgments of lower courts have been reversed or modified, whether or not the judgments of the lower courts have been substantially affirmed.

In what Learned Hand described as a "peculiarity of admiralty practice," when a claimant took an appeal from a judgment in his or her favor, no interest would accrue during the pendency of the appeal if the court of appeals affirmed the judgment of the district court. Lauro v. United States, 168 F.2d 714, 716 (2d Cir. 1948). The first sentence of Appellate Rule 37 does not differentiate between defendants' and plaintiffs' appeals. The Second Circuit acknowledged the force of Appellate Rule 37, adopted in 1967, and overruled the peculiar admiralty rule. Kotsopoulos v. Asturia Shipping Co., S.A., 467 F.2d 91 (2d Cir. 1972).

22. The *Litton* case is discussed later with respect to the issue of the proper rate of interest to be applied. See pp. 32-34 *infra*.

plaintiffs, the best example of litigation in which the amount of recovery is fixed before liablity itself has been finally established is found in cases in which trial courts erroneously set aside verdicts or other fact-finding determinations that established the amount of plaintiffs' recoveries.

Turner is one of a number of court of appeals' decisions holding that interest may be allowed for the period of appeal from erroneous trial court judgments setting aside verdicts for plaintiffs and ordering judgments for defendants n.o.v. *See, e.g., Louisiana & Arkansas Ry. Co. v. Pratt,* 142 F.2d 847 (5th Cir. 1944); *Givens v. Missouri-Kansas-Texas R. Co.* 196 F.2d 905 (5th Cir. 1952); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 509 F.2d 784 (5th Cir. 1975); *Buck v. Burton,* 768 F.2d 285 (8th Cir. 1985); *Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706 (5th Cir. 1986) *(en banc). And see Bell v. Westinghouse Electric Corp.,* 507 A.2d 548 (D.C. App. 1986). All of these cases, with the exception of *Affiliated Capital,* held that an interest recovery should be granted.[23]

Closely related to the procedural setting of an erroneous trial court judgment n.o.v. for defendant are those cases in which trial courts erroneously granted new trials or erroneously required plaintiff to accept a remittitur to avoid a new trial. *See, e.g., Taylor v. Washington Termianl Co.,* 308 F. Supp. 1152 (D.D.C. 1970) (erroneous order granting new trial); Fassbinder v. Pennsylvania R. Co., 233 F. Supp. 574 (W.D. Pa. 1964) (erroneous order granting new trial); *Gorsalitz v. Olin-Mathieson Chemical Corp.,* 429 F.2d 1033 (5th Cir. 1970) (erroneous requirement of remittitur). After plaintiffs had ultimately succeeded in obtaining reversals of the erroneous orders, interest was allowed from the dates of the original verdicts in all of these cases.

Sustaining of a post-trial motion under Rule 60(b) of the Federal Rules of Civil Procedure may present a comparable

23. *In Affiliated Capital,* the Fifth Circuit held that the interest remedy for the period of delay in protracted litigation was a remedy that was within the discretionary power of the courts to grant or to deny on a case-by-case evaluation. The Fifth Circuit decision is probably unique. Discussion of this aspect of *Affiliated Capital* appears at p. 27 *infra.*

issue regarding interest on a judgment. For example, a trial court set aside an award by a panel of arbitrators, erroneously ruling that the award was tainted by conflict of interest. Having earlier confirmed the award, the trial court thereafter granted a motion to set the judgment aside under Rule 60(b). The Seventh Circuit reinstated the judgment, confirming the award with interest from the date of the original judgment. *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (7th Cir. 1984).

(ii) Merits-Claim Liability Established Before the Amount of Recovery was Settled

When the amount of recovery on merits-claims is a matter of extended controversy, the final resolution of the controversy often involves a court's shaping of factual matters ascertained as litigation proceeded. Various litigation devices are used in appropriate contexts to avoid the expensive and time-consuming process of *de novo* litigation of facts. As a result, the ultimate determination of the amount to be recovered may fail to take account of the time value of money associated with the litigation period following the decision establishing a defendant's liability. In these circumstances, federal courts generally allow interest on judgments back to the dates on which liability was established.

When a trial court errs only in the amount of a plaintiff's recovery on the merits-claim, it is sometimes possible, without further factual hearing, to ascertain from the trial court's original finding the amount to be added or subtracted. Two kinds of trial court error exemplify this situation. The court may determine correctly the total amount of plaintiff's loss but allocate that total incorrectly among parties to the litigation. Correction is accomplished by reallocation of the respective portions. In another setting, a trial court may erroneously include or exclude damages of a certain kind. Where the fact-finding process has already ascertained the amount of those damages, correction of the erroneous judgment is accomplished by subtracting or adding the known amount. Cases of both types exist.

In tort cases involving issues of comparative negligence or joint and several liability of multiple defendants, a district court

may err in allocating the injured person's loss among the relevant parties. In a tort case that presents an issue of comparative negligence, the district court's assessment of plaintiff's gross damages may be unassailable, but the allocation of percentages of fault may be held erroneous. Thus, in a case arising out of an airplane landing accident, the District Court originally apportioned negligence between the pilot and the Government on a 25%-75% basis. After the Court of Appeals reversed for error in the lower court's analysis, the District Court found that the Government was liable for only 60% of the loss. The trial court held further that interest on the amount of the Government's liability so found would run from the date of the earlier erroneous apportionment. The Court of Appeals for the Fifth Circuit affirmed. *Brooks v. United States,* 757 F.2d 734 (5th Cir. 1985). *See also Coyle Lines, Inc. v. United States,* 195 F.2d 737 (5th Cir. 1952).

Valuation of a plaintiff's claim below the correct amount occurs if a trial court excludes from its calculation recovery for a certain type of damages. Correction of that kind of error may not require reopening of any fact-finding inquiry. In two cases, the errors could be corrected by addition of the amounts previously determined for damages of the kind without conducting fresh factual inquiry. *See, e.g., Maxey v. Freightliner Corp.,* 727 F.2d 350 (5th Cir. 1984) (after verdict including an amount for punitive damages, district court erroneously disallowed punitive damages); *Laffey v. Northwest Airlines,* 582 F. Supp. 280 (D.D.C. 1982) (statutory double damages for violation of "Equal Pay Act" erroneously disallowed). The courts in *Maxey* and *Laffey* allowed interest on the judgments from the date of the erroneous judgments.

Valuation of a plaintiff's claim above the correct amount occurs if the trial court improperly includes in its calculation damages of a kind not recoverable. In a Ninth Circuit case, the trial court erroneously included a specified amount of damages as punitive damages. After reversal by the Court of Appeals, the District Court entered judgment for compensatory damages only and ruled that interest would run on the judgment from the

date of its original judgment. The Court of Appeals affirmed. *Lew Wenzel & Co. v. London Litho Supply Co.,* 563 F.2d 1367 (9th Cir. 1977).

When a trial court commits error as to the amount of damages and the correct amount is not ascertainable from the original fact-finding process, ordinarily the only recourse is a new trial on the issue of the amount of recovery on the merits-claim. When that trial is held, the new evidence may include pre-judgment interest, or other appropriate adjustment for time value of money, so that the second fact-finding process may take into account time value of money for the period of time since the erroneous trial court determination. If that occurs, the period of interest on the judgment properly begins at the date of the later fact determination.

The clearest example would be a case in which the district court erred in the amount of pre-judgment interest allowed. Recalculation of pre-judgment interest by the court at the proper rate and to the date of the new judgment would fully remedy the delay. So long as pre-judgment interest continues to accrue during the prolongation of litigation, the period for allowing interest on the judgment under §1961 does not commence. *See Ashland Oil, Inc. v. Phillips Petroleum Co.,* 607 F.2d 335 (10th Cir. 1979), *cert. denied,* 446 U.S. 936 (1980); *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.,* 213 F.2d 443 (2d Cir. 1954).[24]

When a trial court errs only as to the amount of a plaintiff's recovery on the underlying merits-claim and a new trial or other proceeding is required to ascertain the correct amount of the recovery, but the new trial or other proceeding measures the recovery without taking into account lapse of time since the original fact-finding decision, courts tend to allow interest on the judgments to accrue from the dates on which the trial courts found defendants liable, even though the proper amount of

24. *But see* Peterson v. Crown Financial Corp., 553 F. Supp. 114 (E.D. Pa. 1982) (trial court held to have erred in setting rate of pre-judgment interest: on remand, court corrected error but allowed pre-judgment interest only to the date of the original judgment with interest on the judgment thereafter).

recovery was not ascertained until later. In this group of cases, although liability is fixed earlier, the amount of ultimate recovery is uncertain until the controlling judgment. In some of these cases, the amount eventually found due on the merits-claim was lower than the erroneous prior judgment. In other cases, the amount found due at the end was higher. Regardless of the direction of the change, courts with minor exception allowed interest on the judgments to begin to accrue as of the dates of the erroneous judgments.

Illustrative is an Elkins Act case in which the Court of Appeals for the First Circuit was able to modify the lower court's judgment to eliminate a portion of the damages wrongfully included by the District Court. *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971). The First Circuit ordered interest on the modified judgment to begin as of the date of the erroneous trial court judgment.

Similarly, the Court of Appeals for the Ninth Circuit reduced an award of attorneys' fees to the prevailing plaintiff in a private antitrust action, but ordered that interest on the lowered amount run from the date of the original award. *Perkins v. Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973).[25] *And see*

25. The Ninth Circuit declined to follow a 1952 decision by the Seventh Circuit, which reduced an attorneys' fees award and directed that interest on the award begin with the Court of Appeals' decision. Harris v. Chicago Great Western Ry. Co., 197 F.2d 829 (7th Cir. 1952). The Seventh Circuit's opinion reflects that court's very considerable antipathy to the claim for attorneys' fees in a shareholder derivative suit. The court said that the amount of plaintiff's request "seems to us so unreasonable as to shock the judicial conscience. . . . Indeed, the amount to which we have reduced the fees may still seem extravagant not only to the public but to other members of the bar." 197 F.2d at 836. That this attitude affected the court's decision regarding interest on the fee award cannot be established with certainty, but some relationship is likely.

In a subsequent Seventh Circuit case, a proceeding against the United States under the Tort Claims Act, the Court of Appeals held that the first trial court's determination of damages was erroneously high and directed the lower court to eliminate all elements of a certain kind of expenses from the damage calculation. In a later appeal, the Seventh Circuit held that interest on the revised judgment commenced on the date of that judgment. The decision was an interpretation of a provision of the Tort Claims Act, not of 28 U.S.C. §1961. Merchants Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456 (7th Cir. 1960).

Premier Corp. v. Serrano, 471 F. Supp. 444 (S.D. Fla. 1979).

The Sixth Circuit brought a personal injury case to a close eight years after the accident by deciding, after two prior reversals, not to remand again to a District Court which had not fully complied with the appellate court's earlier mandate. The Court of Appeals, using the record before it, made an elaborate calculation of the amount to be recovered by each of ten plaintiffs. The Court of Appeals ordered interest on these amounts to accrue from the date of the District Court's earlier erroneous judgment. *Petition of United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973).

In a Fifth Circuit case, the trial court erred in setting too low an amount of attorneys' fees to be recovered by a plaintiff who had prevailed in a private antitrust action. The Court of Appeals directed the District Court to reconsider the amount. On appeal from the District Court's subsequent order increasing the amount of the fees recovery from $45,000 to $266,000, the Court of Appeals ordered that interest accrue on the increased amount from the date of the erroneous award. *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (*en banc*).[26]

A similar result was reached in a suit against the United States under the Public Vessels Act. A series of erroneous determinations of the amount of plaintiff's claim, with ensuing appeals, resulted in substantial delay before the case was brought to a close in 1974. The District Court then held that interest on that amount should accrue from 1968:

> The fact that this court has been unable to compute damages satisfactorily and that our decisions have been reversed and remanded twice should not work to plaintiff's detriment. She became entitled to interest as of the day the final judgment on liability was rendered, and it would be

26. Portions of the increased amount of attorneys' fees were compensation for services involved in the appeal from the District Court's erroneous award. The Court of Appeals held that the period of interest on these sums did not relate back to the date of the original award.

> inequitable to impose the costs associated with the use of money on her rather than on the defendant whose wrongful conduct resulted in the invocation of the judicial process and who had use of the money during the pendency of the various appeals.

Mascuilli v. United States, 383 F. Supp. 50, 53 (E.D. Pa. 1974), *aff'd without opinion,* 519 F.2d 1398 (3d Cir. 1975).[27] Interest was thus allowed for a substantial period of time during which the correct amount of the judgment was not yet known. Search for the correct amount did not entail adding pre-judgment interest. The court decided that the period of the restitution remedy began when defendant's liability was established even though the amount of damages was not made certain until later.

Mascuilli and *Copper Liquor* contrast with a personal injury case in the Eighth Circuit. A bench trial concluded with judgment for plaintiffs. The Court of Appeals affirmed as to liability, but held that the trial judge's findings as to damages were insufficient under Fed. R. Civ. P. 52(a). On remand, the District Court made explicit findings and entered a new judgment in the same amounts of its original judgment. The Court of Appeals held that judgment interest accrued only from the date of the second judgment. *Hysell v. Iowa Public Service Co.,* 559 F.2d 468 (8th Cir. 1977). The only authority relied upon by the Court of Appeals was one prior case in which plaintiff had failed to get an Appellate Rule 37 mandate regarding interest and a request for recall of the mandate was no longer timely. *Riha v. International Telephone & Telegraph Corp.,* 533 F.2d 1053 (8th Cir. 1976).[28]

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27. The *Mascuilli* court applied a provision of the Public Vessels Act for interest on judgments, but the court's rationale equally fits cases governed by §1961.

28. *Hysell* was not cited by the Eighth Circuit in its 1985 decision embracing the principle of restitution as applied to interest on judgments in extended litigation. Buc v. Burton, 768 F.2d 285 (8th Cir. 1985). *And see* Premier Corp. v. Serrano, 471 F. Supp. 444 (S.D. Fla. 1979).

A 1962 decision in the Ninth Circuit allowed interest from the second determination of the amount of plaintiff's recovery. In that case the trial court had initially awarded damages to the United States of $8,000, but the

(iii) Merits-Claim Liability and Amount of Recovery Reconsidered

In a number of cases, after trial courts had found defendants liable on the merits-claims, appellate courts found errors in these findings that required further proceedings in the trial courts with regard to liability and those further proceedings involved redetermination of the amount of recovery as well. In these cases, the question of liability was again decided against defendants. However, the amounts of recovery were based upon the evidence relied upon in the original proceeding. Thus, no adjustment was possible for the time value of money associated with the time of appeal and retrial. In these circumstances, in three cases, the Court of Appeals for the Ninth Circuit held that interest on the later judgments would begin to accrue at the time of the original, erroneous decisions. All three cases were private antitrust actions.

In two of these extended cases, the amount of damages eventually found in the second bench trials were the same in nominal dollars as the damages found in the original trials. A statute of limitations issue was involved in the first of these cases. A Supreme Court decision resolved that issue in a way that required the case to be tried again. Plaintiffs again recovered. The amount of the damages found in the second trial was the same as in the first trial. In the second case, the District Court retried the case on its merits because an erroneous definition of the relevant market had been used in the first trial. Again, plaintiffs prevailed on the merits of the antitrust case, and again there was no change in the amount of damages. In both cases, the Ninth Circuit held that interest under §1961 would run from the dates of the original District Court judgments. *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 616 F.2d 394 (9th Cir.), *cert. denied,* 449 U.S. 831 (1980); *Twin City Sportservice, Inc.*

Government established on appeal that it was entitled to recovery of $159,000. United States v. Hougham, 301 F.2d 133 (9th Cir. 1962). While never overruling *Hougham,* the Ninth Circuit has entirely disavowed the "narrow interpretation" of §1961 that underlay the 1962 decision. See text and note at n.20 *supra*.

v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir.), *cert denied*, 459 U.S. 1009 (1982).

The third of the Ninth Circuit's major cases requiring retrial did result in a change in the amount of plaintiffs' recovery. Unlike *Mt. Hood Stages* and *Twin City Sportservice*, this case involved a jury trial. The first judgment, based on the first verdict, was vacated on appeal for error in the jury instructions on the burden of proof of wrongful conduct and on the scope of recoverable losses in antitrust litigation. The second verdict, also for plaintiff, was substantially higher in amount than the first. Trebled, the initial verdict was $6.219 million, whereas the second verdict, trebled, was $10.762 million. The Ninth Circuit found that the higher verdict of the second jury was not based on the jury's having considered the time value of money between the first and second verdicts. Therefore, the court concluded, it was proper to take account of the time value of money for that period by allowing interest on the amount of the original judgment. The Ninth Circuit held that plaintiff should receive interest under §1961 on the $6.219 million for the six-year period between the two verdicts. Thereafter, the court held, interest under §1961 ran on the higher amount of the second verdict plus attorneys' fees. *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984).

The Ninth Circuit's decision in *Handgards* is sound in its conclusion that the period of judgment interest should begin as of the date of the original verdict, but the principal sum for the entire period of judgment interest should have been the amount of the second verdict. Both juries found defendant liable for violating antitrust law. The different burden of proof did not alter the conclusion in the first trial. In this sense, as in *Mt. Hood Stages* and in *Twin City Sportservice*, the second verdict confirmed the liability conclusion in the first verdict. However, in *Handgards* defendant argued successfully that the amount of recovery in the first verdict had been incorrect. That verdict was vacated and the issue of amount of recovery was retried to a new jury. Only the second verdict was unassailable as to the amount of plaintiff's recovery. Since the retrial did not include adjustment for the time value of money or the interval between the

first verdict and the second, the better conclusion would use the amount of the second verdict as the principal sum for calculation of interest on the judgment.[29]

The modern decisions discussed above provide overwhelming authority for the conclusion that, in litigation extended by appeals, federal courts have the power to provide a remedy for the time value of money associated with delay in such litigation running its course. A different view was espoused, some thirty years ago, by the Court of Appeals for the Second Circuit. That court concluded that the "equitable construction" of §1961, whereby interest on a judgment was allowed for a period before entry of the controlling judgment, was an erroneous reading of the statute. The Second Circuit so held in 1947 and, again, in 1958. *Briggs v. Pennsylvania R. Co.*, 164 F.2d 21 (2d Cir. 1947); *Powers v. N.Y. Central R. Co.*, 251 F.2d 813 (2d Cir. 1958) (erroneous trial court decision granting judgment n.o.v. for defendant).[30]

The Second Circuit has not spoken on the question since the adoption in 1967 of Rule 37 of the Federal Rules of Appellate Procedure. The Rule requires an appellate court, in a case like *Powers*, to include in the mandate a term expressly deciding whether or not interest is to be allowed for the time the case had been pending on appeal. A requirement that courts of appeals be explicit on the issue makes sense only if the courts have

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29. It does not appear that plaintiff sought recovery of judgment interest on this principle in the District Court. *See* Handgards, Inc. v. Ethicon, Inc., 552 F. Supp. 820 (N.D. Cal. 1982) *aff'd*, 743 F.2d 1282 (1984), *cert. denied*, _____ U.S. _____, 105 S. Ct. 963 (1985). Only the defendant appealed to the Court of Appeals. The appellate court, therefore, had no occasion to consider the correct principal amount to be used for the interval between the two verdicts. The Court of Appeals satisfied itself that the second verdict was not based on any evidence related to the period after the first trial and, on the basis, affirmed the District Court's decision.

30. A direct conflict between the Second Circuit and the Fifth Circuit emerged when the Second Circuit decided the *Briggs* case in 1948. The Supreme Court granted certiorari to resolve the conflict, but decided the case without reaching the question of the proper interpretation of the statute providing for interest on judgments. Briggs v. Pennsylvania R. Co., 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948).

statutory authority to allow interest to plaintiffs in this circumstance. The Second Circuit is unlikely to adhere to its idiosyncratic view of §1961 in light of Rule 37. *See Kotsopoulos v. Asturia Shipping Co., S.A.*, 467 F.2d 91 (2d Cir. 1972) (court applied Rule 37 to overrule its prior precedents regarding interest on judgments in admiralty actions).

It is fair to say, therefore, that it is generally settled law in federal courts, under §1961, that in cases extended by appeals, interest on money judgments may be allowed for the periods of the appeals and should be allowed if the amounts to be recovered in the ultimate judgments have not been adjusted to take account of the time value of money associated with the periods of the appeals.

(b) Cases Extended By Post-Verdict Or Post-Finding Proceedings In District Courts

Only a few federal cases have considered the effect of extended trial court proceedings on the issue of interest on money judgments. The quality of the analysis in those few cases has been less than satisfactory. The restitution principle that was given force in cases extended by appeals is equally applicable in cases extended by the time required for district courts to resolve the questions presented by post-verdict or post-finding motions. In cases extended by appeals, the decisions that begin accrual of interest on the judgments from the dates of the verdicts or findings include periods of appellate review as well as periods of post-verdict or post-finding deliberations by trial courts. When lapse of time has resulted from extended trial court proceedings without further delay from appeals, the few decided cases have not always perceived that this type of delay enriches a defendant and causes a plaintiff reciprocal loss.

One case to do so involved a considerable gap between court-finding and entry of judgment due to apparent oversight by the court clerk. The remedial consequence of this inadvertent failure to enter a judgment into the formal record was the subject of a 1984 decision by the Court of Appeals for the Eighth Circuit. In a non-jury trial on a claimed overdue promissory note, the District Court had found for plaintiff. The court's

order, on May 10, 1983, did not appear in the formal record as a judgment until March 17, 1984. The Court of Appeals held that interest on the judgment began to accrue in May 1983 when the judgment ought to have been entered. The Eighth Circuit adopted the rationale of cases allowing plaintiffs relief where appellate review postpones entry of the final judgment: §1961 should be interpreted so that costs resulting from the loss of use of money are not imposed on prevailing plaintiffs. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Knudsen*, 749 F.2d 496 (8th Cir. 1984).

The Eighth Circuit decision is fully consistent in rationale and result with the decisions allowing recovery of interest for cases extended by appeals. In several other cases, however, the question of whether to allow interest in cases extended by trial court proceedings has been framed in an inappropriate manner.

A 1972 case addressed the effect of time that elapsed after a jury verdict as the district court resolved certain questions left open by the verdict. A judgment for plaintiff, based on the verdict, was not entered until six weeks later. Plaintiff sought interest, characterized as pre-judgment interest, for the six-week period. The Court of Appeals for the Fifth Circuit stated that six weeks was not an unreasonable time for the trial court's consideration of the issues still before it when the verdict was accepted. Relief was denied. *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972).

Under the reasoning in *Barrios*, allowance of post-verdict interest turns upon characterization of the time taken by a trial judge in deliberating upon motions or other matters that must be decided before that court enters its final judgment. To put the question in terms of dilatoriness of the court is unsound. Defendant's benefit and plaintiff"s loss of the time value of money occur whether the trial judge acts with dispatch or otherwise. To make a plaintiff's right to interest or a defendant's obligation to pay turn on the nature of a trial judge's actions is, to say the least, unseemly. In cases extended by appeals, allowance of interest never depends upon inquiry into how efficiently the court of appeals handles the business of the court. No such standard should be considered when the passage of

time results from a trial court's having had post-verdict motions, or other matters, under advisement. Interest on the controlling judgment, when it is entered, should run from the date of the verdict.

Prior to 1972, courts that addressed the issue of interest for periods of post-verdict proceedings in district courts characterized the question as a mechanical function determined by the formal act of entry of a judgment. Some have focused on the procedural distinction between a clerk-entered judgment under FED. R. CIV. P. 58 and a court-ordered judgment under FED. R. CIV. P. 54. Others have considered the procedural effects with respect to enforcement of a judgment that flow from the filing of motions for new trial or judgment notwithstanding the verdict. Sometimes the issue has been put in terms of finality of a judgment for purposes of appeal. The unstated premise in opinions of this set of cases is that the period of interest under §1961 must come after the date of entry of a judgment.[31]

The analytic weakness of the doctrine followed in these older cases is demonstrated by two more recent decisions, which ought to have been decided alike, but which came to opposite conclusions because the courts relied on FED. R. CIV. P. 54(b) to determine whether interest should have been allowed for periods of extended proceedings in trial courts after verdict.

In the first case, a private antitrust case, the Court of Appeals for the Seventh Circuit concluded that interest should be allowed for a 20-month period between verdict for money damages and trial court judgment. During that period, the District Court considered and denied defendant's motions for

31. *See, e.g.*, Murphy v. Lehigh Valley R. Co., 158 F.2d 481 (2d Cir. 1946); Christian v. Southern R. Co., 151 F. Supp. 192 (E.D.S.C. 1957); Howell v. Sinclair Refining Co., 20 F.R.D. 623 (N.D. Ala. 1957); Litwinowicz v. Weyerhaeuser Steamship Co., 185 F. Supp. 692 (E.D. Pa. 1960); Caputo v. U.S. Lines Co., 311 F.2d 413 (2d Cir.), *cert. denied*, 374 U.S. 833 (1963); Komie v. Buehler Corp. 449 F.2d 644 (9th Cir. 1971). The usual outcome of these cases was to withhold the restitution remedy for the period of post-verdict proceedings in the district courts. The *Litwinowicz* case found for plaintiff on the theory that the ultimate trial court judgment substantially affirmed the earlier clerk-entered judgment. *See* n. 21 *supra*.

new trial or judgment n.o.v. and, thereafter, considered and denied plaintiff's request for equitable relief. The District Court thereupon entered a money judgment for plaintiff in the amount of the jury verdict, trebled according to law, and denied interest on the period between verdict and judgment. The Seventh Circuit reversed. *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

In the second case, a personal injury case, considerable time elapsed when the District Court kept a motion for new trial or remittitur under advisement for over a year. On May 27, 1975, the jury returned a verdict for $7 million in favor of plaintiffs. On July 2, 1976, the District Court ruled that it would grant a new trial unless plaintiffs filed remittiturs for amounts in excess of $4.68 million. Plaintiffs agreed to the reduced recovery. On July 30, 1976 the court entered a judgment of $4.68 million. Plaintiffs then sought interest on the amount of the judgment, but to accrue from the date of the verdict. The District Court denied plaintiffs' request and the Court of Appeals for the District of Columbia Circuit affirmed. *Hooks v. Washington Sheraton Corp.*, 642 F.2d 614 (D.C. Cir. 1980).

Both courts of appeals deemed the controlling issue to be application of Rule 54 (b), which permits district courts to divide cases when more than one claim for relief is presented or when multiple parties are involved. The Seventh Circuit found that *Ohio-Sealy* was not subject to Rule 54(b) and, therefore, allowed interest from the date of a clerk-entered judgment at the time of the verdict. The District of Columbia Circuit held that *Hooks* was subject to Rule 54(b) because the defendant had filed third-party claims against its insurers, claims that were pending through the period between verdict and final district court judgment for plaintiff on the primary claim. A vigorous dissent in *Hooks* by Judge Mikva observed that the case was indistinguishable from *Ohio-Sealy* (642 F.2d 618, 619). The majority responded that the Seventh Circuit had also relied on Rule 54(b) but found it did not apply in that case.

Remarkably, neither the courts nor the attorneys in these cases seemed to be aware of the comparable body of law

regarding allowance of interest in cases extended by appeals. Neither plaintiff contended that the final district court judgment should have borne interest from the date of the verdict. Judge Mikva's well-reasoned dissent in *Hooks* tried to frame the dispositive issue as unrelated to Rule 54(b), but the dissent was unable to put the issue in a proper framework.[32]

Procedural rules applicable in district courts refer to judgments for many purposes. It is a mistake to consider any rule independent of its manifest purpose. The time for filing post-verdict motions is very short; the date that opens the period is fixed by a clerk-entered judgment under FED. R. CIV. P. 58, 59(b); *cf.* FED. R. CIV. P. 50(b). Ripening of the right of a party to take an appeal and setting a baseline for measuring the timeliness of a notice of appeal are functions of an entry of a judgment. FED. R. CIV. P. 73, 54(b). Execution of judgment becomes timely 10 days after its entry unless the court allows otherwise.

The question of the period of judgment interest to be allowed when extended proceedings occur in district courts is unlikely to be answered adequately by reference to docket entries. The remedial issue is separate from other aspects of district court procedure. Interest on a judgment is a corollary remedy incident to the final judgment. In many cases, clerk-entered judgments under Rule 58 will be a point to begin accrual of judgment interest, but an important and substantive

32. In *Ohio-Sealy,* the Seventh Circuit entertained a defense argument based upon Rule 54(b). The Court of Appeals found that this rule was not called into play in the case before it, thus distinguishing cases relied upon by defendant, rather than rejecting the argument as unsound in its premise. The Court of Appeals added, however, that "...it would make no sense to adopt the rule that interest to which [plaintiff] is entitled by law on its judgment properly entered under Rule 58 had to be forfeited if [plaintiff] desired to press its request for equitable relief." 585 F.2d at 846. The "sense" to which the Court of Appeals referred is an appropriate measure of the interest recovery, which is not necessarily determinable by the nature of the docket entries in a case. In *Ohio-Sealy,* a ministerial act under Rule 58 happened to fix the time when judgment interest should begin to accrue. The same result should be reached whether or not the court clerk carried out this duty on time.

remedial question should not be conditioned upon the ministerial act of a court clerk.

The same restitutionary purposes apply whether litigation is extended by trial court proceedings or by appellate review. The period of interest on a judgment should be related to the time when the amount of plaintiff's recovery on the underlying merits-claim became settled.

(3) Disallowance of Interest on Judgments in Extended Cases

Appellate Rule 37's provision on courts of appeals' decisions other than affirmances does not require allowance of judgment interest to relate back. The Rule requires that a court of appeals issue an explicit instruction with respect to interest for the period of the appeal. Neither the Rule nor the Advisory Committee's Notes make clear what circumstances would warrant a decision to disallow interest for the time before the court of appeals' judgment. One possibility, of course, is that the court of appeals may have factored into its calculation of the amount of a money judgment the time value of money for the full time before the appellate court's decision. If the court of appeals has not calculated the amount of the judgment, but remands for the lower court to do so, the nature of the remand may require that the distinct court make a calculation that factors in the time value of money up to the new determination of the principal sum of the money judgment.[33]

In a few cases, courts have denied judgment interest for some part of the period of extended litigation on the ground that interest should not begin to accrue until the amount of the principal obligation had been liquidated.[34] When the amount of

33. The court of appeals' judgment may be the first decision in the history of a case that establishes defendant's liability on the merits. Absent a prior verdict or trial court finding of either liability or the amount of recovery, the period of interest on the judgment would begin at the time of the court of appeals' judgment.

34. *See* Harris v. Chicago Great Western Ry. Co., 197 F.2d 829 (7th Cir. 1952); United States v. Hougham, 301 F.2d 133 (9th Cir. 1962); *cf.* Merchants Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456 (7th Cir. 1960). *See also* Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir. 1977). In *Hysell,*

recovery on a merits-claim is in controversy, the amount may be ultimately fixed long after merits-claim liability has been established. Most of the cases in this category, as discussed earlier, give no weight to the notion that interest cannot accrue on an uncertain amount. This view has been associated in the past with awards of pre-judgment interest, but modern law regarding pre-judgment interest rejects this view.[35] Underlying the doctrine about uncertainty of amount was concern for a defendant's inability to stop accrual of interest by payment. Rule 67 of the Federal Rules of Civil Procedure allows a defendant, before or after trial, to deposit money in court and thereby control its interest liability for whatever amount defendant elects to deposit.[36] *Cf.* FED. R. CIV. P. 68. Whatever force exists in disallowing pre-judgment interest when neither defendant's liability nor the amount of recovery has been judicially established in any prior proceeding, the reasoning is inappropriate in any case involving interest on a judgment where a defendant's liability has been established conclusively and the only controverted issue is the amount of recovery.

The Fifth Circuit recently held that the discretion granted by Appellate Rule 37 and the leeway of "equitable construction" of §1961 permitted the court to disallow interest for the period of extended litigation even though the Court of Appeals had previously held that the District Court's judgment n.o.v. for defendant had been erroneous. The Court of Appeals explained its decision on the ground that plaintiff's victory on the merits-claim had not been "clear cut." The merit-claim was a private

NOTES *(Continued)*

a bench trial in a personal injury case concluded with a judgment for plaintiffs. The Court of Appeals reversed for lack of sufficient findings under Fed. R. Civ. P. 52(a). On remand, the District Court made specific findings of fact and awarded the same amounts to plaintiffs. The Court of Appeals, affirming, held that interest on the judgment did not begin until the second trial court judgment. The Court of Appeals relied solely on its own earlier decision denying relief for lack of an Appellate Rule 37 mandate and lack of a timely request to recall the mandate. Riha v. International Telephone & Telegraph Corp., 533 F.2d 1053 (8th Cir. 1976).

35. *See* note 3 *supra.*

36. *See* Perkins v. Standard Oil Co., 487 F.2d 672, 675 (9th Cir. 1973).

antitrust suit based upon a conspiracy between government officials and cable television companies to allocate territories within the City of Houston. The Court of Appeals had upheld plaintiff's right to recover against one of the private companies involved. In denying judgment interest, the court appears to have been influenced by the view that antitrust regulation will not be, in the end, a tool for regulating state or city governments. A concurring judge, Judge Patrick Higginbotham, wrote: "In my view, this defendant was defeated on the merits because it passed through a time window of changing law rather than because it engaged in conduct that was malevolent by antitrust standards." *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706, 712, 713 (5th Cir. 1986).

The Fifth Circuit's decision in *Affiliated Capital* may be explicable on the narrow ground that plaintiff's victory on the merits-claim rested upon a substantive legal standard of doubtful validity in light of changing law. Whether the Court of Appeals will allow or require case-by-case consideration of the "equities" in other circumstances seems doubtful. Hard cases do sometimes make bad law. In reaching for a rationale to disallow judgment interest in this particular case, the Court of Appeals may have overstated the criteria to be followed in more typical cases. Allowance of interest on judgments ought to be determined by principled and predictable criteria. The language of *Affiliated Capital* does not meet this standard.

A 1983 district court decision disallowed interest on a judgment for the period between a verdict for plaintiff and final judgment in the district court. Judge Leval found that the substantial interval of time between verdict and judgment was attributable to three separate instances of misconduct by plaintiff's counsel. *Red Star Towing & Transporation Co. v. The Cargo Ship "Ming Giant"*, 563 F. Supp. 224 (S.D.N.Y. 1983).

(4) Conclusion

Overall, federal courts have provided consistent and sound answers to the first two questions posed at the outset of this part of the paper. When extended litigation occurs, determinations regarding interest on judgments are a function of the ultimate

judgments that bring to a close the controversy on the underlying merits-claims. When those ultimate judgments are entered, courts look back through the time that has elapsed and allow interest on the judgments to begin to accrue when the amounts of recovery on the merits-claims are no longer subject to adjustment to take account of the time value of money. Allowance of interest on a judgment begins with the earlier of the date substantially establishing defendant's liability or the date settling the amount of recovery. These decisions of the courts are a reasonable interpretation of the governing statute, §1961, and the ancillary rule, Appellate Rule 37. The result goes far toward serving the restitutionary goal of treating parties to extended litigation neutrally, so that neither benefits nor suffers substantially from the passage of time needed to conclude litigation.

We turn now to the third question: what rate of interest applies in extended litigation with regard to judgment interest?

B. Rate of Interest Applicable in Calculation of Interest on Judgments

When a controlling judgment has established that a plaintiff is entitled to a money judgment and has determined that interest is to be allowed on the judgment, the "principal" of the classic interest calculation formula is fixed. The "time" element is resolved by the issues discussed in Part III A. With a known "principal" and the period of "time" established, the remaining factor is the "rate of interest." Multiplying the amount of the "principal" by the "rate of interest" for the determined "time" produces the amount of interest.

For calculations of interest on judgments in federal courts, the rate of interest is set by statute.[37] The purpose of this part of the paper is to examine the relevant statutory provisions and

37. Courts sometimes use the statutory rate for interest on judgments as a guide to the choice of a proper rate of pre-judgment interest. *See, e.g.*, United States v. Dollar Rent A Car Systems, Inc., 712 F.2d 938, 940 n.5 (4th Cir. 1983).

their implementation in cases allowing interest on judgments, particularly in protracted litigation.

(1) The Statutory Interest Rate

Section 1961(a) provides that interest shall be calculated:

> at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment.

Section 1961(b) adds:

> Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

The Treasury bill transactions to which the statutory rate of interest is indexed are well-known, regular transactions in the marketplace. The Treasury has borrowed money through this device regularly for many years. Records of the results of the auctions are readily accessible.[38] A chart tracing the average rates of interest over the past decade appears in Part I of this paper (p. 6 *supra*).

The statutory scheme in §1961 contemplates that, for any given judgment, only one reference will be made to the Treasury bill marketplace. The statute plainly rejects the possibility of a judgment being subject to a floating interest rate. Floating rates are commonly found in private credit transactions. Rates of interest in such transactions move up or down or remain constant in response to rate changes in the marketplace. For interest on a judgment, however, the rate observed in the market at a statutorily designated moment applies to that judgment as a fixed rate of interest for the entire period of interest accrual. A "snapshot" rather than a motion picture is taken. Section 1961 specifies that the point of time for reference

38. The statute requires the Director of the Administrative Office of the United States Courts to distribute notices of the rate and any changes in it. Notices from the Administrative Office serve the convenience of the courts, but the data are available, if necessary, from other sources.

to the Treasury bill market is "the last auction . . . immediately prior to the date of judgment."

In an ordinary case, the legislative choice refers to the Treasury bill rate settled just before the period of judgment interest begins to run. Where a district court's judgment follows promptly after the fact-finding determination and no appeal is taken, the whole period of interest on the judgment comes after entry of the controlling judgment.

If the period of interest on a judgment runs beyond one year, §1961 provides for compound interest to be calculated. The amount of accrued and unpaid interest at the end of the first year is added to the amount of the unpaid principal and, for the second year or any part thereof, interest accrues at the rate originally fixed for the judgment but on the total of unpaid interest and principal. Should the judgment remain unpaid at the end of another year, the same process of recomputing the amount of principal would be followed again.

(2) The Rate Of Interest Applicable In Extended Litigation

For reasons explored in Part IIIA, extended litigation differs from the simple model of litigation. In many cases, the period of interest on a judgment begins to run before the date of the controlling judgment. When interest on a judgment begins to accrue before the entry of the ultimate controlling judgment, proper application of §1961 must be determined. The legislative choices of applying a single rate of interest to the entire period of judgment interest, of setting the rate as of the beginning of the interest period, and of taking a "snapshot" of Treasury bill market rates immediately before the interest period can be adapted easily to cases of extended litigation. In such a case, after the period of interest accrual has been defined, the parties can make the requisite "snapshot" observation of the Treasury bill market place and apply the observed rate to the amount of the principal for that period. The process of implementation requires no intervention by courts. Section 1961 would thereby be applied consistently in simple cases and cases of extended litigation.

An example demonstrates the point. Assume that: (1) A jury verdict for plaintiff in the amount of $100,000 was returned May 1, 1985. (2) A timely motion for judgment n.o.v. was filed by defendant and granted by the trial court on November 1, 1985. (3) On September 1, 1986, the court of appeals reversed the judgment below, directed entry of judgment on the basis of the jury verdict of May 1, 1985, and provided by its mandate for interest from that date. In this situation, the controlling judgment is that of the court of appeals. The erroneous judgment below was entered months after the jury verdict. The date when judgment on the verdict in favor of plaintiff should have been entered was the date of the verdict. A clerk-entered judgment pursuant to Fed. R. Civ. P. 58 may or may not have been entered on that date. To carry out the manifest intent of §1961(a), the proper rate of interest in this case would be ascertained by reference to the last Treasury bill auction before May 1, 1985. That rate should apply, with annual compounding, until the judgment has been satisfied.

The need to be concerned about determining the correct time for the "snapshot" of a market rate of interest is largely a result of the statutory scheme adopted in 1982. The referenced source of interest rates is a dynamic market that changes month by month. It matters, and depending on the volatility of the market, it may matter a lot that the proper point of time is used. Before the 1982 amendment of §1961, the statute incorporated by reference a source of interest rates that was highly stable. The federal statute referred to judgment interest rates of the states in which the federal courts sat.[39] The underlying rates were embedded in state statutory laws that, until recently, changed very infrequently. In application of the pre-1982 version of §1961, even in extended litigation, an issue was unlikely to arise concerning the correct date to look at state law. The statutory scheme was, for this function, not time-sensitive. Section 1961, in its current form, is quite time-sensitive.

Case law under the superseded form of §1961 was unlikely to contain precedents dealing with the proper time to refer to

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39. *See* note 9 *supra.*

interest rates set by state law. However, one significant decision did come down under that version of §1961. In the years before 1982, some state legislatures acted to amend their statutory rates to reflect better the actual time value of money. Oregon was one such state. As a result, in a case of extended litigation in federal court, it became necessary to decide the time for the "snapshot." The case was the Ninth Circuit decision holding that the period of interest on a judgment began as of the date of the verdict where the District Court had erred in granting judgment n.o.v. for defendant.[40] The Court of Appeals for the Ninth Circuit held that the proper time to look to state law was the time when judgment interest began to accrue rather than the later time when the controlling appellate judgment reversed the erroneous trial court judgment. *Turner v. Japan Lines, Ltd.* 702 F.2d 752 (9th Cir. 1983).[41]

The *Turner* rationale is fully applicable to §1961 as amended in 1982. Congress made no change in the language defining the moment of the proper "spanshot." Only the place at which to point the camera was revised. On the time to refer to the Treasury bill market under present law, therefore, *Turner* is on point. More decisions on the issue can be expected in the future because of the heightened time-sensitivity of §1961 in its current form. *Turner* is a sound construction of the law in the context of extended litigation. It should be followed.

(3) Transition Questions Presented When §1961 Was Amended

After Congress amended §1961 in 1982, ongoing cases in the federal courts eventually came to, or will come to conclusion, many with plaintiffs prevailing in actions for money judgments. In cases of an extended nature already concluded, interest on the judgments has been allowed for periods of time

40. This case was discussed at length in Part IIIA, at pp. 16-17 *supra.*

41. The *Turner* court considered the possibility of stepping up the rate of interest as of the date of change in state laws. Following what the court understood to be the state law on changing interest rates during the life of a judgment, the court declined to make this adjustment. *See* Annot., 41 A.L.R. 4th 694 (1985).

that extended back before the effective date of the amendment. The question inevitably arose whether and how the amended version of §1961 applied in extended litigation that reached ultimate conclusion on the merits-claims after October 1, 1982. That was the effective date of the Federal Courts Improvement Act of 1982, one section of which contained the amendment of §1961.[42]

(a) When §1961 as Amended Governs

Courts that have faced the contention that §1961 as amended governed allowance of interest on judgments in cases ongoing as of October 1, 1982, have concluded that the pivot point was *a* judgment date. Two possible judgment dates were considered in typical extended litigation cases. One was the ultimate and controlling judgment, typically a court of appeals judgment, that brought to a close controversy over issues related to the merits-claims. Alternatively, courts focused on the penultimate judgment, typically the trial court judgment that, whether affirmed or reversed, moved the merits-claim litigation toward its eventual conclusion. Most courts resolved the question by choosing the second alternative.

Arguments could be advanced for either choice. Section 1961(a), on its face, speaks of allowance of interest "on any money judgment in a civil case recovered in a district court." Even though controlling judgments are frequently decisions of appellate courts, those decisions are eventually made effective by mandates to district courts. For purposes of dating the

42. Description of October 1, 1982 as the effective date of the amendment of §1961 may be questionable. The amendment was a small appendage to the Federal Courts Improvement Act of 1982, which, principally, created a new federal appellate court, the Court of Appeals for the Federal Circuit, and modified the legislative charter of the Court of Claims. Pub.L. No. 97-164, Title I, 96 Stat. 55 (1982). It was, of course, imperative to have a specific date on which the new appellate court and the modified Court of Claims began to function. The effective date provision, Title IV, §402, would be most meaningful for that purpose.

effectiveness of statutory change, one could look to the kind of judgment mentioned in the statute.[43]

On the other hand, the amendment of §1961 had a remedial purpose of considerable importance.[44] Legislative procedures are slow to come to fruition. Impetus for reform of §1961 began long before 1982.[45] The consummated reform would be imple-

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43. For this purpose, the district court judgments entered after the courts of appeals mandates might have been more appropriate to consider than the district court judgments entered before appeal.

44. The Senate Report accompanying the bill that became the Federal Courts Improvement Act of 1982 gave this explanation of the purpose of the amendment of §1961:

> Section 302. Under current law, the interest rate granted on judgments during appeal is based on varying State laws and frequently falls below the contemporary cost of money. As a consequence, a losing defendant may have an economic incentive to appeal a judgment solely in order to retain his money and accumulate interest on it at the commercial rate during the pendency of the appeal.
>
> Section 302 amends 28 U.S.C. 1961 by setting a realistic and nationally [*sic*] rate of interest on judgments in the Federal courts. The provision would tie the post-judgment interest rate to the rate used by the Internal Revenue Service for delinquent taxes under 26 U.S.C. 6621. That rate is a composite of prime rates from throughout the country that is reviewed and revised periodically. Furthermore, by consolidating all the provisions for interest on judgments of Title 28 into this section, this rate becomes uniformly applicable to all litigation in the Federal courts.

S. Rep. No. 97-275, 97th Cong., 1st Sess. 30 (1981); *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 40. The bill was amended on the floor of Congress to substitute Treasury bill rates of interest for the composite of prime rates in the bill as reported. *See* 127 CONG. REC. 14,683, 14,699, 14,701 (1981).

45. President Carter formally proposed that §1961 be amended on February 27, 1979. In a Message to Congress, he offered a number of new measures to solve problems relating to administration of the federal courts. With respect to interest on judgments, he declared:

> Sometimes years pass between the time of an injury and the granting of a judgment. More years may pass while that judgment is appealed. Current federal law is ambiguous about whether and under what circumstances interest may be paid for the period prior to judgment, and permits unrealistically low as well as conflicting rates of interest while the decision is under appeal. Yet such interest may be essential in order to truly compensate the plaintiff or to avoid the unjust enrichment of the defendant . . . If a judgment on appeal is entered at a rate well below the prime interest rate, the losing party may well profit from the appeal.

H.R. Doc. No. 96-59, 96th Cong., 1st Sess. 4 (1979). More than three years passed before President Carter's initiative was enacted into law. The delay was associated with controversy over other aspects of the legislation that became the Federal Courts Improvement Act of 1982.

mented most quickly if the new act were held to govern when the ultimate controlling judgments came down after its effective date.

Ultimate resolution of all issues on the underlying merits-claims does not assure prompt payments by defendants. Considerable time may elapse before any money judgment is satisfied. In 1983, the United States recovered a money judgment to renew a 1969 judgment. Renewal was necessary in order to levy on defendant's property, since the judgment lien on the prior judgment, though not the monetary obligation of the judgment, had expired. The Court of Appeals for the Second Circuit upheld the new judgment and directed that it bear interest under the current version of §1961. *United States v. Hannon*, 728 F.2d 142 (2d Cir. 1984).[46]

For any period of time, long or short, after an ultimate judgment entered after October 1, 1982, the rate of interest should be that fixed under the 1982 version of §1961. Given that current law applies with respect to judgment interest from the date of a current judgment to the future date of payment, the same rate should apply to the entire period of interest on the judgment. The statutory scheme of §1961 clearly contemplates one rate of interest for the whole period of judgment interest. It follows that the rate on judgments in extended litigation that concludes after 1982 should be established under §1961 as amended.

Precedent for choice of the ultimate controlling judgments as the pivotal time for applying §1961 as amended in ongoing

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46. *Hannon* involved considerable unpaid interest that had accrued on the 1969 judgment. For purposes of the 1983 judgment, this unpaid post-judgment interest became pre-judgment interest. The Court of Appeals left open for the lower court whether, in calculating the pre-judgment interest, effect should be given to the amendment of §1961 in 1982. 728 F.2d at 145-146 n.7.

cases is found in the implementation of analogous provisions in the Federal Rules of Civil Procedure, promulgated in 1938.

Rule 54 significantly altered the law then extant regarding taxation of costs. The Rules became effective on September 1, 1938. Two weeks later, the Court of Appeals for the Ninth Circuit issued a controlling judgment reversing a lower court decision for plaintiff in an income tax controversy. *Welch v. Solomon*, 99 F.2d 41 (9th Cir. 1938). On remand, costs were taxed pursuant to Rule 54(d), which the lower court held was the current and, therefore, the governing law. *Solomon v. Welch*, 28 F. Supp. 823 (S.D. Cal. 1939).

In a case pending on appeal in the Eighth Circuit at the time of the effective date of the amendment to §1961, the lower court had awarded plaintiffs attorneys' fees and costs but had denied interest on the award. The Court of Appeals held that interest should have been granted on the award and directed that interest be computed at the rate of amended §1961 for the full period of interest. The controlling judgment regarding interest was that of the Court of Appeals. The law in effect when that judgment was entered was the amended version of §1961. The Court of Appeals said: "It is the law now, and should be used by the District Court." *R. W. T. v. Dalton*, 712 F.2d 1225, 1235 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983).[47]

After the amendment of §1961, most Courts of Appeals chose the date of the penultimate district court judgments as the pivotal date. These courts held that the law that governed interest on judgments was the law in effect at the time of the lower courts' judgments. The doubtful quality of the advocacy in these cases and the absence of overt consideration by the courts of the alternative theory, that the pivotal judgment was the ultimate judgment, make it questionable whether the decisions are properly characterized as holdings. Many of the cases were

47. *See also* Bradley v. School Board, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed.2d 476 (1974) (application of Attorney's Fees Awards Act of 1976 to case pending on appeal when the Act took effect).

complicated by failure of plaintiffs to bring the 1982 amendment to the attention of the courts in timely fashion.[48]

Most of these Court of Appeals' decisions were affirmances or substantial affirmances of the judgments of the courts below. In that circumstance, it is less clear that the court of appeals' action was the controlling judgment than in cases where the appellate court has reversed or modified a judgment of the court below.

Illustrative of courts that chose the penultimate judgment as the pivotal date is a Second Circuit decision in a private antitrust case. The case was on appeal when §1961 was amended. The appeal concluded with the Court of Appeals affirming judgment for the plaintiff. After denial of certiorari by the Supreme Court and remand to the trial court, plaintiff for the first time sought to have the rate of interest of amended §1961 applied. As the briefs make clear, counsel assumed that the date of the District Court judgment controlled, but agrued for retrospective application of the amendment. The District Court denied the request and the Court of Appeals affirmed. *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984). Both courts applied the rate of interest on judgments in effect when the trial court had entered its final judgment for plaintiff before October 1, 1982.

In two Fifth Circuit cases, trial court judgments for plaintiffs entered before §1961 was amended were substantially affirmed after the amendment. Further trial court proceedings were necessary in both cases. In the first case, this led to modification of the percentages of negligence in a comparative

48. In some instances, counsel first raised the point after the principal amount of the judgment and interest on the judgment had been paid. United States ex rel. Billows Electric Supply Co. v. E.J.T. Construction Co., 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd*, 729 F.2d 1450 (3d Cir. 1984); *and see* International Telemeter Corp. v. Hamlin International Corp., 754 F.2d 1492 (9th Cir. 1985). In other cases, counsel never relied on the amendment to §1961; the courts *sua sponte* took note of the amendment and found it inapplicable. Peterson v. Crown Financial Corp., 553 F. Supp. 114, 116-117 n.4 (E.D. Pa. 1982); United States v. Dollar Rent A Car Systems, Inc., 712 F.2d 938, 940 n.5 (4th Cir. 1983).

negligence allocation. In the second, the further consideration did not result in any change of the amount of the judgment. In both cases the rate of interest under the old version of §1961 was held to apply, but only for the time that elapsed during the appeals of the original judgments. The opinions indicated that the §1961 amendment would apply thereafter. *Brooks v. United States,* 757 F.2d 734 (5th Cir. 1985); *Reaves v. Ole Man River Towing, Inc.,* 761 F.2d 1111 (5th Cir. 1985).

Without explanation and by a *per curiam* opinion, the Court of Appeals for the Seventh Circuit held that the law in effect at the time of a lower court's erroneous judgment applied to determine the rate of interest recoverable by plaintiffs. The Court of Appeals had issued the controlling judgment, directing that the District Court enter judgment for plaintiffs on an arbitration award which the lower court had refused to confirm. Although the Court of Appeals' judgment was made in 1984, that court declared that the date of the lower court's judgment governed. *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (7th Cir. 1984).

In a Third Circuit case, the 1982 amendment took effect after the Court of Appeals had reversed a trial court judgment and remanded for further proceedings. The timing differed from the prior cases in which the appellate courts' decisions were rendered after October 1, 1982. The District Court concluded those further proceedings after the amendment was in effect. Because of the extended litigation, plaintiff was held entitled to interest on the judgment beginning in July 1979, the date of the District Court's prior erroneous judgment. Plaintiff did not contend that the interest should be calculated under §1961 as amended.[49] The District Court, *sua sponte,* noted the new law but stated that the law in effect at the time of the 1979 judgment governed. *Peterson v. Crown Financial Corp.,* 553 F. Supp. 114, 116-117 n.4 (E.D. Pa. 1982).[50]

49. Plaintiffs sole strategy was to seek to have the period of pre-judgment interest brought forward to the current proceeding.

50. In another district court proceeding in the Third Circuit, a petition for certiorari from a Court of Appeals' decision in May 1982 was denied by the Supreme Court in October 1982, a few days after the amendment to §196[illegible] took effect. No further proceedings were required in the District Court. After defendant had paid the judgment and interest on the judgment, plaintiff sought additional interest under §1961 as amended. Plaintiff contended that the date of the Supreme Court's denial of certiorari was sufficient to bring the judgment under the new version §1961 for purposes of the rate of interest. The District Court denied the request for additional interest. United States ex rel. Billows Electric Supply Co. v. E. J. T. Construction Co., 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd,* 729 F.2d 1450 (3d Cir. 1984)

None of the courts basing their choice of law on earlier district court judgments addressed the pernicious consequence of failure to give prompt effect to §1961 as amended. The rates of interest on judgments applicable under the pre-1982 version of the §1961 could be and often were very low relative to rates of interest prevailing in the market place. Section 1961 was amended to correct a mischief which, among other things, induced defendants to try to prolong litigation. Panels of the Second Circuit had angrily declared in several appeals that defendants' solé reasons for appeal were to obtain the benefit of the difference between time value of money in the market place and the rate of interest on judgments. *Bankers Trust Co. v. Publicker Industries, Inc.,* 641 F.2d 1361, 1367 (2d Cir. 1981); *Brady v. Chemical Construction Corp.,* 740 F.2d 195, 202 (2d Cir. 1984). The *Litton—Merit Insurance Co.* position diluted the effectiveness of the legislature's response to a manifest problem.[51] The Fifth Circuit, by limiting the time to which the old interest rate would apply, alleviated to some extent the harm to the parties and to the judicial system.

51. Remarkably, the Second Circuit in *Litton* cited *Brady,* without noting this aspect of the decision. 746 F.2d at 176. The failure of the Second Circuit panel in *Litton* to take account of the deleterious effect of delayed implementation of an important reform may be explained by the fact that, at the time of its decision, the defendant had already paid the judgment. *See* 746 F.2d at 170 n.3. However, the *Merit* Insurance Co. litigation continued. For a vehement opinion dismissing a later appeal by defendant, *see* Merit Insurance Co. v. Leatherby Insurance Co., 737 F.2d 580 (7th Cir.), *cert. denied,* _____ U.S. _____, 105 S. Ct. 297 (1984). *And see* Note, *The Post-Judgment Interest Rate in Pennsylvania: Ignoring Reality Too Long,* 23 DUQUESNE L. REV. 1083 (1984).

(b) Effect of 1982 Amendment on Judgments Governed Initially by the Prior Version of §1961

When §1961 was amended, effective October 1, 1982, many judgments entered before that date were still unsatisfied. Some were unsatisfied because the judgments had been stayed pending the conclusion of ongoing litigation. As noted in the previous section, a number of courts, after the litigation had run its course, held that the pre-1982 version of §1961 applied to fix the rate of interest on the judgments. Several courts, having concluded that the prior version of §1961 governed the judgments as entered, held that the rate of interest would step up, as of October 1, 1982, to a rate ascertained by application of §1961 as amended.

The Court of Appeals for the Second Circuit suggested this should occur, but left the matter open for the District Court to decide. *United States v. Hannon*, 728 F.2d 142, 145-146 n.7 (2d Cir. 1984) (1969 judgment). In a later case, however, the Court of Appeals held that the amendment of §1961 could not sensibly be construed to increase rates on pending judgments as of its effective date because the amendment was a change in the method of ascertaining the rate, not a change in rate, and because a change in the interest rate midway in the period of accrual of interest was inconsistent with the statutory provision that tied the applicable rate of interest to the date of judgment. *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984).

The Court of Appeals for the Ninth Circuit disagreed and ordered that the interest rate on a judgment, pending when §1961 was amended, be shifted to the rate determined by the amended provision. The case was an extended private antitrust action in which plaintiff finally prevailed in 1984. Because of the delay caused by the case having been tried to a jury twice and appealed several times, the court determined that interest on the judgment would begin in 1976, the date of the first verdict. From that date to October 1, 1982, the judgment bore interest under the old version of §1961, which borrowed the rate

applicable under state law. On the effective date of the amendment, the rate of interest was fixed pursuant to the formula in §1961 as amended. *Handgards, Inc. v. Ethicon, Inc.*, 552 F. Supp. 820 (N.D. Cal. 1982), *aff'd*, 743 F.2d 1282 (9th Cir. 1984).[52]

As previously noted, the Court of Appeals for the Fifth Circuit, while not using October 1, 1982, as the pivot, held in two cases that the new version of §1961 would apply to unsatisfied judgments at some point thereafter. That court allowed the pre-1982 version to apply for the full time of one stage of extended litigation that straddled October 1, 1982. *Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985); *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111 (5th Cir. 1985).

A number of other courts rendered decisions in which a change from the old version of §1961 to the new could have been considered, but the opinions give no indication that either the parties or the court thought of the possibility. *See, e.g., United States v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938 (4th Cir. 1983); *Merit Insurance Co. v. Leatherby Insurance Co.*, 728 F.2d 943 (7th Cir. 1984); *Peterson v. Crown Financial Corp.*, 553 F. Supp. 114 (E.D. Pa. 1982); *see also United States ex rel. Billows Electric Supply Co. v. E.J.T. Construction Co.*, 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd*, 729 F.2d 1450 (3d Cir. 1984).

Handgards demonstrated the feasibility of adapting an open judgment to a new rate of interest. *Litton's* doubts, whatever they may have been, were soluble. Adaptation is not only feasible, but affirmatively desirable to bring into force as promptly as possible the reform of the law embodied in the new legislation. Sub-market rates of interest distort the dynamics of litigation and deprive the courts of the power to grant an effective restitution remedy that transfers benefits obtained by defendants to compensate plaintiffs for losses suffered. Section 1961, as amended in 1982, adopts a conservative, standard

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52. In addition to shifting the rate of interest as of the effective date of the amendment to §1961, the courts in *Handgards* utilized different sums as the principal in the two periods of interest calculation. For discussion of the questionable use of two principal amounts, *see* text at p. 23 *supra*.

measure of the benefits/losses that consciously understates the time value of money in credit transactions involving ordinary business entities. Prompt implementation of the reformed measure of the remedy is sound judicial policy.

CONCLUSION

Federal law on judgment interest has emerged as a major issue of remedies. During the past fifteen years, Congress and the courts have acted to define the remedy of interest on money judgments to meet the circumstance of a sharp rise in the time value of money. The governing statute and court rule continue the historic principle that the remedy of judgment interest serves the elementary goal of restitution: neither party should obtain a benefit or suffer a loss because of the extended time necessarily required for litigation to run its course. The extraordinarily high level of the time value of money in recent years has led the parties and the courts to examine with greater care the dimensions of the remedy of judgment interest, a question treated more or less perfunctorily in the past. The concern has been greatest in litigation extended in time.

In cases where extensive time has elapsed in resolution of the merits-claims being litigated, the corollary remedy of judgment interest has been articulated with the timing of decisions regarding those underlying claims. When the amount of recovery on an underlying claim is no longer subject to adjustment for the time value of money, the period for judgment interest begins. In extended litigation, this often requires that judgment interest accrue during post-verdict or post-finding proceedings and during periods of appellate review.

The rate of interest on judgments, historically fixed by law at a rate above prevailing marketplace rates by use of "legal interest" or the equivalent, now tracks marketplace rates through monthly auctions of Treasury bills.

Interest on judgments has moved into the forefront of remedial law. The elements of a federal law responsive to the new economic climate are already in place. A coherent, principled and sound analysis of the remedy is now clearly evident in the analyses of the courts.

APPENDIX

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C., 20544**

WILLIAM E. FOLEY
DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

June 22, 1982

MEMORANDUM TO ALL: United States Judges
United States Magistrates
Circuit Executives
Clerks of Court
District Circuit Executives

SUBJECT: Post-Judgment Interest

Pursuant to the provisions of §302 of the Federal Courts Improvement Act of 1982, P.L. 97-164, signed April 2, 1982, and effective October 1, 1982, post-judgment interest on most civil money judgments will be computed at a new, and varying rate.

Present law, 28 U.S.C. §1961, ties interest rates on money judgments in the district courts (except tax cases) to the rates allowable under state law. Section 2411 provides that in United States cases, except tax cases, the rate is 4%. Tax cases carry a rate of interest set yearly by the Secretary of Treasury—currently 20%.

The purpose of the amendments is to set a realistic national rate, which will adapt to market conditions, thereby eliminating a major incentive for the filing of otherwise inappropriate appeals. The Judicial Conference has supported such a change for a number of years.

Initially, language in the various bills would have adopted for all cases the rate set for tax cases under 26 U.S.C. §6621. This rate is currently 20% due to very high interest rates in 1981 and will not be readjusted until February 1983. The Office of Management and Budget pointed out the high costs to the

United States that this rate would cause, and noted that it does not change sufficiently often to reflect market conditions.

As a result, on December 8, 1981, Senator Grassley offered as an amendment on the Senate floor, the basic substance of the new provisions. Later refinements in language were made. For convenience, the full text of the amended sections, as they will read, is set out as an addendum.

The provisions of new section 1961 will apply in the district courts, to United States cases as well as private actions, but will not be applicable in the bankruptcy courts. This section will govern also the rate of interest on judgments of the Court of Appeals for the Federal Circuit. This provision is somewhat unusual for a Circuit Court, but is necessary since it will hear cases arising form the Court of International Trade, the Claims Court, a number of quasi-judicial boards and various executive agencies. Separate provisions are also made for United States Claims Court judgments.

The first questions to arise are, of course, the practical ones of what is the rate, how is it ascertained, when is it set, when the information becomes available and the like. We shall try to answer all of these as well as the initial legal questions.

The Treasury Department holds an auction of 52-week Treasury Bills every four weeks; therefore the rate will change thirteen times a year. The dates are set in advance, so that we now understand that the auction results of the September 30, 1982 auction will be initially applicable on October 1, 1982, the effective date of section 302. This assumes that Congress raises the debt limit sufficiently that an auction can be held. The precise rate will be certified to the Director of the Administrative Office by the Treasury after each auction. We are already receiving the certifications, so even if that particular auction were not held we will have certification of the applicable rate.

The Treasury Department also issues a press release which is usually carried in the Wall Street Journal and in some other papers. This reported rate may be difficult to locate. The Treasury press release calls this the "Investment Rate (Equivalent Coupon-issue Yield)." The financial press may use either name or may not report it at all. This rate must not be confused

with the average "annual investment *yield*—which is an entirely different rate used for purposes of the All-Savers Certificates.

At the request of the Director of the Administrative Office, the Treasury Department's recorded message reporting results of the most recent auctions of the 13, 26, and 52-week Treasury bills has been augmented to include the information the courts will need. That recording is reached by calling (202) 287-4100, in the Bureau of the Public Debt. The recording carries the "Equivalent Coupon-issue Yield" as such.

Judges, and clerks of court will be advised by the Administrative Office of the officially certified rate.

Once the rate has been established for a particular judgment, that rate will not change, even though a subsequent auction is held before the money is paid into the court, or the judgment is otherwise satisfied.

Although the matter will not arise in a specific case until late October, we deem it important to answer now, before problems occur, the question of what interest rate will be applicable to a judgment entered on the same day as the auction.

As the Supreme Court most recently pointed out in the case of *Bread Political Action Committee, et al v. F.E.C. et al,* United States Supreme Court, 80-1481, decided March 8, 1982, citing its prior decisions, the analysis of an issue of statutory construction begins with the language of the statute itself. Certainly one must start with the plain and ordinary meaning of the words of the legislature, before looking further afield.

For our purposes here, the language of the statute contains sufficient specificity that we must conclude that the court looks first at the *date* of the judgment, not its hour of signing.Then, a simple check of the calendar will reveal the date of the *last* auction *before* that date. By referring to the date of the judgment, rather than simply to the judgment, which would have raised the question of computation of time, both for events such as auctions, and time periods within which actions are to be taken, the Congress has made it clear that one is to consider the judgment as in existence for this purpose, on all of the day on which it is rendered. The usual rules as to the "date of

judgment" are applicable here. (See Rule 85 and Rule 79, Federal Rules of Civil Procedure.)

I conclude that the plain language of the law requires that the interest rate on judgments entered on the same day as an auction of 52-week Treasury bills is the rate of the preceeding [*sic*] auction.

While in most cases the parties themselves will perform the calculations, questions will inevitably arise to be presented to the Clerk's Office. One question may well be what the statute means when it says that the interest is *computed* daily but *compounded* annually. Either one of the following two equations,—either of which give the same result, could be used. (Watch out for calculator discrepancies due to dropping of digits!)

1. $\dfrac{\text{Equivalent coupon-issue yield}}{365 \text{ (days)}} \times \text{amount of judgment} \times$ (number of days interest has run.)

Example, given a rate of 14.26%:

$$\frac{.1426}{365} \times \$20{,}000.00 \times 12 \text{ (days)} = \$96.13$$

2. $\dfrac{\text{Equivalent coupon-issue yield} \times \text{amount of judgment}}{365 \text{ (days)}} \times$ (number of days interest has run.)

Example, given a rate of 14.26%:

$$\frac{.1426 \times \$20{,}000.00}{365} \times 12 \text{ (days)} = \$96.13$$

If the interest is to be compounded, due to a delay in payment of one year or more, simply multiply the equivalent coupon-issue yield by the amount of the judgment, then add that interest amount to the amount of the original judgment. This gives you a new judgment amount to be inserted in the equation for the shorter time periods.

We will be most happy to answer any other questions this topic generates.

Sincerely,

/s/
Carl H. Imlay
General Counsel

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544**

WILLIAM E. FOLEY
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JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

July 27, 1982

MEMORANDUM TO ALL: United States Judges
United States Magistrates
Circuit Executives
Clerks of Court
District Court Executives

SUBJECT: Post-Judgment Interest—
Our Memorandum of June 22, 1982

I. Effective Date

There have been several recent inquiries to this office as to the interest rate which should apply to judgments entered prior to October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (section 302(a), amending 28 U.S.C. § 1961). It is our view that the new rate will apply only to judgments entered on or after that date. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

II. Correction to Prior Memorandum

We have been advised that many small hand-held calculators will drop any digits more than two places to the right of the decimal point—thus giving different answers to the two equations contained in our June 22nd memorandum. Because the daily interest rate computed under equation #1 will be a very small number, it may be easier to use equation #2 on any hand-size calculators. If you get different answers depending upon whether you use equation #1 or equation #2, the problem is in the calculator.

The difficulty of assuring accuracy in the calculation of interest is illustrated by errors on page 4 of our memorandum, in which the assumed interest rate in both equations was shown as 14.26 percent but should have read 14.62 percent. Please substitute the two attached pages for pages three and four of the June 22nd memorandum.

It seems advisable to emphasize again that in most cases the parties should be expected to perform the calculations of the applicable interest rate. This information is being provided so that judicial officers and employees can be responsive to questions on this issue.

Sincerely

/s/

CARL H. IMLAY
General Counsel

Enclosures

28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of title 28, United States Code, and section 1302 of the Act of July 27, 1956 (31 U.S.C. § 724a), and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

* * *

28 U.S.C. § 2411. Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

* * *

28 U.S.C. § 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only

under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid, from the date of the filing of the transcript of the judgment in the General Accounting Office to the date of the mandate of the affirmance, at a rate of interest equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. Such interest shall not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed.

* * *

31 U.S.C. § 724a. Appropriations for payment of judgments and compromise settlements against United States

There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements (not in excess of $100,000, or its equivalent in foreign currencies at the time of payment, in any one case) which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28, together with such interest and costs as may be specified in such judgments or otherwise authorized by law: *Provided,* That, whenever a judgment of a district court is payable from this appropriation, interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance (except that in cases reviewed by the Supreme Court interest shall not be allowed beyond the term of the Court at which the judgment was affirmed): *Provided further,* That whenever a judgment rendered by the Courts of

Appeals for the Federal Circuit or the United States Claims Court is payable from this appropriation, interest payable thereon in accordance with section 2516(b) of Title 28 shall be computed from the date of the filing of the transcript thereof in the General Accounting Office: *Provided further,* That any judgment or compromise settlement against the United States arising out of an express or implied contract entered into by the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration, shall be paid in accordance with this section and sections 2414, 2517, and 2518 of Title 28, and such instrumentality shall reimburse the United States for a judgment or compromise settlement paid by the United States. Notwithstanding the other provisions of this section, judgments against the United States arising out of activities of the United States Postal Service shall be paid by the Postal Service out of any funds available to it.

Judges and clerks of court will be advised by the Administrative Office of the officially certified rate.

Once the rate has been established for a particular judgment, that rate will not change even if a subsequent auction should be held before the money is paid into the court or the judgment otherwise satisfied.

Although the matter will not arise in a specific case until later October, we deem it important to anwer now, before problems occur, the question of what interest rate will be applicable to a judgment entered on the same day as the auction.

As the Supreme Court most recently pointed out in the case of *Bread Political Action Committee v. Federal Election Commission,* 455 U.S. ____, 102 S.Ct. 1235 (1982), citing its prior decisions, the analysis of an issue of statutory construction begins with the language of the statute itself. Certainly one must start with the plain ordinary meaning of the words of the legislature before looking farther afield.

The language of this statute contains sufficient specificity that we conclude the court should be guided first by the *date* of the judgment, disregarding its hour of signing. Then, a simple check of the calendar will reveal the date of the *last* auction

before that date. By referring to the date of the judgment (rather than simply to "the judgment," which would have raised the question of computation of time, both for events such as auctions, and time periods within which actions are to be taken) the Congress has established that the judgment is to be treated as in existence on the whole day upon which it was rendered. The usual rules as to the "date of judgment" are applicable here. (See Rule 58 and Rule 79, Federal Rules of Civil Procedure.)

I conclude that the plain language of the law requires that the interest rate on judgments entered on the same day as an auction of 52-week Treasury bills is the rate as of the preceding auction.

While in most cases the parties themselves will perform the calculations, questions will inevitably arise to be presented to the Clerk's Office. One question may well be what the statute means when it says that the interest is *computed* daily but *compounded* annually. Either one of the following two equations, both of which give the same result, may be used. (Watch out for calculator discrepancies due to dropping of digits.)

1. $\dfrac{\text{Equivalent coupon-issue yield}}{\text{365 (days)}} \times \text{(amt. of judgment)} \times \text{(no. of days interest has run.)}$

Example, given a rate of 14.62%:

$$\frac{.1462}{365} \times \$20{,}000.00 \times 12 \text{ (days)} = \$96.13$$

2. $\dfrac{\text{Equivalent coupon-issue yield} \times \text{amount of judgment}}{\text{365 (days)}} \times \text{(no. of days interest has run.)}$

Example, given a rate of 14.62%:

$$\frac{.1462 \times \$20{,}000.00}{365} \times 12 \text{ (days)} = \$96.13$$

If the interest is to be compounded on account of a delay in payment of one year or more, simply multiply the equivalent coupon-issue yield by the amount of the judgment and then add that interest amount to the amount of the original judgment. This gives you a new judgment amount to be inserted in the equation for the shorter time periods.

We will be most happy to try to answer any other questions this topic generates.

Sincerely,

/s/

CARL H. IMLAY
General Counsel

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF PHILADELPHIA :

I, Joseph A. Bonjorno, being duly sworn according to law, do depose and say as follows:

1. I was both President and a principal shareholder of Columbia Metal Culvert Company ("Columbia") from its formation to its dissolution and liquidation in 1980.

2. Columbia was plaintiff in the lawsuit against Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum and Chemical Sales, Inc., (hereinafter collectively referred to as "Kaiser") docketed in the United States District Court for the Eastern District of Pennsylvania as Civil Action number 74-122 (the "Lawsuit"). On May 30, 1980, after the dissolution and liquidation of Columbia, I and the other principal shareholders of Columbia were substituted as plaintiffs in the Lawsuit.

3. In April, 1977, I, on behalf of Columbia, entered into an agreement with Philadelphia National Bank ("PNB") to refinance a loan originally extended by PNB to Columbia. Under this refinancing agreement, the balance of the loan amount of $193,760.28 was payable by Columbia to PNB at an interest rate equal to 2.5 percent above PNB's daily prime rate, or 3 percent above PNB's average monthly commercial paper rate, whichever rate was greater, compounded monthly.

4. Because of financial reverses suffered as a result of Kaiser's business practices, which ultimately destroyed our business, neither I nor the other principal shareholders of Columbia could raise the funds necessary to pay off PNB's loan to Columbia until Kaiser paid the damages attributable to its acts on July 3, 1986.

5. Although I and the other principal shareholders of Columbia repeatedly attempted, from 1977 to 1986, to reach a settlement with PNB on its loan to Columbia, PNB always insisted on repayment of all outstanding principal and interest.

6. Accordingly, on September 2 and September 18, 1986, I and the other principal shareholders of Columbia paid PNB the principal balance of $193,760.28 on its loan to Columbia. Additionally, we paid PNB $444,867.30 in interest that had accrued on this loan from December, 1978 to September, 1986.

7. Between August, 1979 and August, 1980, interest on the balance due PNB ranged from a low of 14 percent to a high of 22.5 percent, compounded monthly. From August, 1980 to August, 1981, interest ranged from a low of 15 percent to a high of 23 percent, compounded monthly. From August, 1981 to August, 1982, interest ranged from a low of 17 percent to a high of 22.5 percent. Between February, 1983 and March, 1984, interest on the balance due PNB was calculated at a rate of 13.5 percent, compounded monthly. From April, 1984 through May, 1985, rates ranged from a low of 13 percent to a high of 15.5 percent, again compounded monthly. From June, 1985 through August, 1986, rates ranged from a low of 10 percent to a high of 12.5 percent, compounded monthly.

8. Indeed, the rates of interest paid by Columbia and its shareholders to PNB in the period from August, 1979 through September, 1986 were, almost without exception, higher than the 10.05 percent rate of interest on the judgment which I and the other shareholders of Columbia seek against Kaiser. Moreover, the interest Columbia and its shareholders paid to PNB was compounded on a monthly basis.

/s/
Joseph A. Bonjorno

Sworn to and subscribed
for me this 20th day of
October, 1986.

/s/
Notary Public
LINDA S. PILLION
Notary Public, Phila., Phila. Co.
My Commission Expires Nov. 7, 1988

AFFIDAVIT OF CHARLES J. O'DONNELL

COMMONWEALTH OF PENNSYLVANIA :

SS

COUNTY OF PHILADELPHIA :

Charles J. O'Donnell submits this Affidavit in support of Plaintiffs' claim for interest on the judgment under 28 U.S.C. §1961 and being duly sworn according to law deposes and says:

1. I, Charles J. O'Donnell, am Controller of Duane, Morris & Heckscher.

2. My job duties include overseeing all accounting and financial activities at Duane, Morris & Heckscher.

3. I have a BS in accounting from Drexel University and I am a Certified Public Accountant in Pennsylvania.

4. I have made certain calculations of the interest accruing on certain principal amounts in connection with Plaintiffs' brief in support of their claim for interest on the judgment under 28 U.S.C. §1961. These calculations are set forth in the computer printouts attached to this Affidavit as Exhibits "A" and "B". These printouts accurately reflect the calculations made by me as described in this Affidavit.

5. As reflected in Exhibit "A", I computed the interest on the sum of $9,567,939.00 from August 16, 1979 through July 3, 1986, using the monthly average prime rate, as supplied by Fidelity Bank, and compounding the interest monthly. The interest on $9,567,939.00 from August 16, 1979 through July 3, 1986, using the monthly average prime rate, is $14,242,410.86. I then computed the interest on that sum, $14,242,410.86, from July 4, 1986 through October 22, 1986, using the monthly average prime rate as supplied by Fidelity Bank and compounded monthly. The total interest on $14,242,410.86 from July 4, 1986 through October 22, 1986, is $336,890.91. Thus, the total interest on $9,567,939.00 from August 16, 1979 through July 3, 1986, which is $14,242,410.86, plus the interest on

$14,242,410.86 from July 4, 1986, through October 22, 1986, which is $336,890.91, equals $14,579,301.77. This figure is the total interest amount reflected in Exhibit "A" using the monthly average prime rate and compounding the interest monthly.

6. As reflected in Exhibit "B", I also computed the interest on the principal $9,567,939.00 from August 16, 1979 through July 3, 1986, using the monthly average prime rate plus three points, which is the interest rate actually available to Plaintiffs during this period from PNB. The interest through July 3, 1986, is $19,631,680.13. The interest on $19,631,680.13 from July 4, 1986, through October 22, 1986, using the monthly average prime rate plus three points is $645,583.29. Thus, the sum of the interest on $9,567,939.00 from August 16, 1979 through July 3, 1986, and the interest on $19,631,680.13 from July 4, 1986, through October 22, 1986, is $19,631,680.13 plus $645,583.29, which equals $20,277,263.42.

7. I have reviewed Exhibit "A" and Exhibit "B" and they accurately reflect the calculations made by me as described in this Affidavit.

/s/
Charles J. O'Donnell

Sworn to and Subscribed
before me this 22nd day
of October, 1986.

/s/
Notary Public
Bernadette J. Scott
Notary Public, Phila., Phila. Co.
My Commission Expires July 16, 1988

Exhibit A

INTEREST AT PRIME RATE

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
16-Aug-79	9,567,939.00	11.91%	49,952.51	9,617,891.51
01-Sep-79	9,617,891.51	12.90%	101,976.00	9,719,867.51
01-Oct-79	9,719,867.51	14.39%	118,792.76	9,838,660.27
01-Nov-79	9,838,660.27	15.55%	125,746.16	9,964,406.43
01-Dec-79	9,964,406.43	15.30%	129,482.68	10,093,889.11
01-Jan-80	10,093,889.11	15.25%	130,736.60	10,224,625.71
01-Feb-80	10,224,625.71	15.63%	126,973.04	10,351,598.75
01-Mar-80	10,351,598.75	18.31%	160,977.29	10,512,576.04
01-Apr-80	10,512,576.04	19.77%	170,822.16	10,683,398.20
01-May-80	10,683,398.20	16.57%	150,349.07	10,833,747.27
01-Jun-80	10,833,747.27	12.63%	112,463.20	10,946,210.47
01-Jul-80	10,946,210.47	11.48%	106,727.05	11,052,937.52
01-Aug-80	11,052,937.52	11.12%	104,388.18	11,157,325.70
01-Sep-80	11,157,325.70	12.23%	112,154.05	11,269,479.75
01-Oct-80	11,269,479.75	13.79%	131,988.76	11,401,468.51
01-Nov-80	11,401,468.51	16.06%	150,499.38	11,551,967.89
01-Dec-80	11,551,967.89	20.35%	199,659.15	11,751,627.04
01-Jan-81	11,751,627.04	20.16%	201,213.61	11,952,840.65
01-Feb-81	11,952,840.65	19.43%	178,159.55	12,131,000.20
01-Mar-81	12,131,000.20	18.05%	185,969.89	12,316,970.09
01-Apr-81	12,316,970.09	17.15%	173,618.66	12,490,588.75
01-May-81	12,490,588.75	19.61%	208,031.61	12,698,620.36
01-Jun-81	12,698,620.36	20.03%	209,057.56	12,907,677.92
01-Jul-81	12,907,677.92	20.39%	223,529.15	13,131,207.07
01-Aug-81	13,131,207.07	20.50%	228,626.91	13,359,833.98
01-Sep-81	13,359,833.98	20.08%	220,492.16	13,580,326.14
01-Oct-81	13,580,326.14	18.45%	212,801.85	13,793,127.99
01-Nov-81	13,793,127.99	16.84%	190,912.01	13,984,040.00
01-Dec-81	13,984,040.00	15.75%	187,060.48	14,171,100.48
01-Jan-82	14,171,100.48	15.75%	189,562.73	14,360,663.21
01-Feb-82	14,360,663.21	16.56%	182,431.57	14,543,094.78
01-Mar-82	14,543,094.78	16.50%	203,802.55	14,746,897.33
01-Apr-82	14,746,897.33	16.50%	199,992.17	14,946,889.50
01-May-82	14,946,889.50	16.50%	209,461.20	15,156,350.70
01-Jun-82	15,156,350.70	16.50%	205,545.03	15,361,895.73
01-Jul-82	15,361,895.73	16.26%	212,145.68	15,574,041.41
01-Aug-82	15,574,041.41	14.39%	190,340.39	15,764,381.80

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Sep-82	15,764,381.80	13.50%	174,919.85	15,939,301.65
01-Oct-82	15,939,301.65	12.52%	169,489.36	16,108,791.01
01-Nov-82	16,108,791.01	11.85%	156,895.21	16,265,686.22
01-Dec-82	16,265,686.22	11.50%	158,868.96	16,424,555.18
01-Jan-83	16,424,555.18	11.16%	155,677.78	16,580,232.96
01-Feb-83	16,580,232.96	10.98%	139,655.53	16,719,888.49
01-Mar-83	16,719,888.49	10.50%	149,104.76	16,868,993.25
01-Apr-83	16,868,993.25	10.50%	145,581.72	17,014,574.97
01-May-83	17,014,574.97	10.50%	151,732.72	17,166,307.69
01-Jun-83	17,166,307.69	10.50%	148,147.59	17,314,455.28
01-Jul-83	17,314,455.28	10.50%	154,406.99	17,468,862.27
01-Aug-83	17,468,862.27	10.89%	161,570.23	17,630,432.50
01-Sep-83	17,630,432.50	11.00%	159,398.43	17,789,830.93
01-Oct-83	17,789,830.93	11.00%	166,200.89	17,956,031.82
01-Nov-83	17,956,031.82	11.00%	162,342.21	18,118,374.03
01-Dec-83	18,118,374.03	11.00%	169,270.29	18,287,644.32
01-Jan-84	18,287,644.32	11.00%	170,851.69	18,458,496.01
01-Feb-84	18,458,496.01	11.00%	161,322.20	18,619,818.21
01-Mar-84	18,619,818.21	11.21%	177,275.97	18,797,094.18
01-Apr-84	18,797,094.18	11.93%	184,314.52	18,981,408.70
01-May-84	18,981,408.70	12.39%	199,741.62	19,181,150.32
01-Jun-84	19,181,150.32	12.60%	198,643.15	19,379,793.47
01-Jul-84	19,379,793.47	13.00%	213,974.16	19,593,767.63
01-Aug-84	19,593,767.63	13.00%	216,336.67	19,810,104.30
01-Sep-84	19,810,104.30	12.97%	211,181.14	20,021,285.44
01-Oct-84	20,021,285.44	12.58%	213,915.09	20,235,200.53
01-Nov-84	20,235,200.53	11.77%	195,754.78	20,430,955.31
01-Dec-84	20,430,955.31	11.06%	191,916.64	20,622,871.95
01-Jan-85	20,622,871.95	10.61%	185,837.50	20,808,709.45
01-Feb-85	20,808,709.45	10.50%	167,609.88	20,976,319.33
01-Mar-85	20,976,319.33	10.50%	187,062.79	21,163,382.12
01-Apr-85	21,163,382.12	10.50%	182,642.89	21,346,025.01
01-May-85	21,346,025.01	10.31%	186,915.15	21,532,940.16
01-Jun-85	21,532,940.16	9.78%	173,089.44	21,706,029.60
01-Jul-85	21,706,029.60	9.50%	175,134.95	21,881,164.55
01-Aug-85	21,881,164.55	9.50%	176,548.03	22,057,712.58
01-Sep-85	22,057,712.58	9.50%	172,231.45	22,229,944.03
01-Oct-85	22,229,944.03	9.50%	179,362.15	22,409,306.18
01-Nov-85	22,409,306.18	9.50%	174,976.77	22,584,282.95
01-Dec-85	22,584,282.95	9.50%	182,221.13	22,766,504.08
01-Jan-86	22,766,504.08	9.50%	183,691.38	22,950,195.46

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Feb-86	22,950,195.46	9.50%	167,253.48	23,117,448.94
01-Mar-86	23,117,448.94	9.10%	178,669.38	23,296,118.32
01-Apr-86	23,296,118.32	8.83%	169,072.38	23,465,190.70
01-May-86	23,465,190.70	8.50%	169,399.39	23,634,590.09
01-Jun-86	23,634,590.09	8.50%	165,118.37	23,799,708.46
01-Jul-86	23,799,708.46	8.16%	10,641.40	23,810,349.86
03-Jul-86	23,810,349.86			

23,810,349.86 - 9,567,939.00 = 14,242,410.86 Interest through 7/3/86

04-Jul-86	14,242,410.86	8.16%	89,153.59	14,331,564.45
01-Aug-86	14,331,564.45	7.90%	96,158.91	14,427,723.36
01-Sep-86	14,427,723.36	7.50%	88,938.02	14,516,661.38
01-Oct-86	14,516,661.38	7.50%	62,640.39	14,579,301.77
22-Oct-86	14,579,301.77	7.50%		

Breakdown of Interest

Interest on Judgement from 8/16/79 to 7/3/86	$14,242,410.86
Interest on interest of $14,579,301.77 from 7/4/86 to 10/22/86 ($14,579,301.77-14,242,410.86)	336,890.91
TOTAL	$14,579,301.77

Exhibit B

INTEREST AT PLAINTIFFS' BORROWING RATE: PRIME +3

Date	Prior Balance	Average Prime Rate +3 Points	Interest Through END OF MONTH	Total
16-Aug-79	9,567,939.00	14.91%	62,535.00	9,630,474.00
01-Sep-79	9,630,474.00	15.90%	125,855.78	9,756,329.78
01-Oct-79	9,756,329.78	17.39%	144,096.98	9,900,426.76
01-Nov-79	9,900,426.76	18.55%	150,947.60	10,051,374.36
01-Dec-79	10,051,374.36	18.30%	156,223.14	10,207,597.50
01-Jan-80	10,207,597.50	18.25%	158,217.76	10,365,815.26
01-Feb-80	10,365,815.26	18.63%	153,433.95	10,519,249.21
01-Mar-80	10,519,249.21	21.31%	190,386.88	10,709,636.09
01-Apr-80	10,709,636.09	22.77%	200,431.57	10,910,067.66
01-May-80	10,910,067.66	19.57%	181,337.28	11,091,404.94
01-Jun-80	11,091,404.94	15.63%	142,486.57	11,233,891.51
01-Jul-80	11,233,891.51	14.48%	138,155.32	11,372,046.83
01-Aug-80	11,372,046.83	14.12%	136,377.32	11,508,424.15
01-Sep-80	11,508,424.15	15.23%	144,060.25	11,652,484.40
01-Oct-80	11,652,484.40	16.79%	166,164.43	11,818,648.83
01-Nov-80	11,818,648.83	19.06%	185,148.04	12,003,796.87
01-Dec-80	12,003,796.87	23.35%	238,053.38	12,241,850.25
01-Jan-81	12,241,850.25	23.16%	240,798.87	12,482,649.12
01-Feb-81	12,482,649.12	22.43%	214,783.64	12,697,432.76
01-Mar-81	12,697,432.76	21.05%	227,005.75	12,924,438.51
01-Apr-81	12,924,438.51	20.15%	214,049.95	13,138,488.46
01-May-81	13,138,488.46	22.61%	252,298.57	13,390,787.03
01-Jun-81	13,390,787.03	23.03%	253,471.09	13,644,258.12
01-Jul-81	13,644,258.12	23.39%	271,049.73	13,915,307.85
01-Aug-81	13,915,307.85	23.50%	277,734.30	14,193,042.15
01-Sep-81	14,193,042.15	23.08%	269,240.07	14,462,282.22
01-Oct-81	14,462,282.22	21.45%	263,471.08	14,725,753.30
01-Nov-81	14,725,753.30	19.84%	240,130.64	14,965,883.94
01-Dec-81	14,965,883.94	18.75%	238,326.58	15,204,210.52
01-Jan-82	15,204,210.52	18.75%	242,121.85	15,446,332.37
01-Feb-82	15,446,332.37	19.56%	231,771.16	15,678,103.53
01-Mar-82	15,678,103.53	19.50%	259,655.17	15,937,758.70
01-Apr-82	15,937,758.70	19.50%	255,440.79	16,193,199.49
01-May-82	16,193,199.49	19.50%	268,186.00	16,461,385.49
01-Jun-82	16,461,385.49	19.50%	263,833.16	16,725,218.65
01-Jul-82	16,725,218.65	19.26%	273,587.92	16,998,806.57

Date	Prior Balance	Average Prime Rate +3 Points	Interest Through END OF MONTH	Total
01-Aug-82	16,998.806.57	17.39%	251,065.39	17,249,871.96
01-Sep-82	17,249,871.96	16.50%	233,936.62	17,483,808.58
01-Oct-82	17,483,808.58	15.52%	230,460.55	17,714,269.13
01-Nov-82	17,714,269.13	14.85%	216,211.15	17,930,480.28
01-Dec-82	17,930,480.28	14.50%	220,815.09	18,151,295.37
01-Jan-83	18,151,295.37	14.16%	218,292.95	18,369,588.32
01-Feb-83	18,369,588.32	13.98%	197,002.51	18,566,590.83
01-Mar-83	18,566,590.83	13.50%	212,879.95	18,779,470.78
01-Apr-83	18,779,470.78	13.50%	208,374.95	18,987,845.73
01-May-83	18,987,845.73	13.50%	217,709.96	19,205,555.69
01-Jun-83	19,205,555.69	13.50%	213,102.74	19,418,658.43
01-Jul-83	19,418,658.43	13.50%	222,649.55	19,641,307.98
01-Aug-83	19,641,307.98	13.89%	231,708.24	19,873,016.22
01-Sep-83	19,873,016.22	14.00%	228,675.80	20,101,692.02
01-Oct-83	20,101,692.02	14.00%	239,017.38	20,340,709.40
01-Nov-83	20,340,709.40	14.00%	234,057.48	20,574,766.88
01-Dec-83	20,574,766.88	14.00%	244,642.43	20,819,409.31
01-Jan-84	20,819,409.31	14.00%	247,551.33	21,066,960.64
01-Feb-84	21,066,960.64	14.00%	234,333.86	21,301,294.50
01-Mar-84	21,301,294.50	14.21%	257,080.36	21,558,374.86
01-Apr-84	21,558,374.86	14.93%	264,547.84	21,822,922.70
01-May-84	21,822,922.70	15.39%	285,246.53	22,108,169.23
01-Jun-84	22,108,169.23	15.60%	283,469.13	22,391,638.36
01-Jul-84	22,391,638.36	16.00%	304,280.89	22,695,919.25
01-Aug-84	22,695,919.25	16.00%	308,415.78	23,004,335.03
01-Sep-84	23,004,335.03	15.97%	301,955.53	23,306,290.56
01-Oct-84	23,306,290.56	15.58%	308,396.50	23,614,687.06
01-Nov-84	23,614,687.06	14.77%	286,675.83	23,901,362.89
01-Dec-84	23,901,362.89	14.06%	285,415.01	24,186,777.90
01-Jan-85	24,186,777.90	13.61%	279,579.27	24,466,357.17
01-Feb-85	24,466,357.17	13.50%	253,377.62	24,719,734.79
01-Mar-85	24,719,734.79	13.50%	283,430.38	25,003,165.17
01-Apr-85	25,003,165.17	13.50%	277,432.38	25,280,597.55
01-May-85	25,280,597.55	13.31%	285,781.57	25,566,379.12
01-Jun-85	25,566,379.12	12.78%	268,552.05	25,834,931.17
01-Jul-85	25,834,931.17	12.50%	274,274.95	26,109,206.12
01-Aug-85	26,109,206.12	12.50%	277,186.78	26,386,392.90
01-Sep-85	26,386,392.90	12.50%	271,093.08	26,657,485.98
01-Oct-85	26,657,485.98	12.50%	283,007.56	26,940,493.54
01-Nov-85	26,940,493.54	12.50%	276,785.89	27,217,279.43
01-Dec-85	27,217,279.43	12.50%	288,950.57	27,506,230.00

Date	Prior Balance	Average Prime Rate +3 Points	Interest Through END OF MONTH	Total
01-Jan-86	27,506,230.00	12.50%	292,018.20	27,798,248.20
01-Feb-86	27,798,248.20	12.50%	266,558.54	28,064,806.74
01-Mar-86	28,064,806.74	12.10%	288,413.95	28,353,220.69
01-Apr-86	28,353,220.69	11.83%	275,686.52	28,628,907.21
01-May-86	28,628,907.21	11.50%	279,622.07	28,908,529.28
01-Jun-86	28,908,529.28	11.50%	273,245.00	29,181,774.28
01-Jul-86	29,181,774.28	11.16%	17,844.85	29,199,619.13
03-Jul-86	29,199,619.13			
29,199,619.13 - 9,567,939.00 = 19,631,680.13 Interest through 7/3/86				
04-Jul-86	19,631,680.13	11.16%	168,068.70	19,799,748.83
01-Aug-86	19,799,748.83	10.90%	183,296.85	19,983,045.68
01-Sep-86	19,983,045.68	10.50%	172,456.42	20,155,502.10
01-Oct-86	20,155,502.10	10.50%	121,761.32	20,277,263.42
22-Oct-86	20,277,263.42	10.50%		

Breakdown of Interest

Interest on Judgement from 8/16/79 to 7/3/86	$19,631,680.13
Interest on interest of $19,631,680.13 from 7/4/86 to 10/22/86 ($20,277,263.42 - 19,631,680.13)	645,583.29
TOTAL	$20,277,263.42

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA K. CLISBY,	:	CIVIL ACTION
vs.	:	NO. 74-122
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	

NOTICE OF APPEAL

Plaintiffs appeal to the United States Court of Appeals for the Third Circuit from the Order of the District Court dated April 11, 1988 awarding plaintiffs post-judgment interest in the amount of $2,632,886.30.

DUANE, MORRIS & HECKSCHER

By: /s/
Henry T. Reath
Michael M. Baylson
Edward G. Biester
Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, As Trustees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc., Plaintiffs	:	CIVIL ACTION
vs.	:	NO. 74-122
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Defendants	:	

NOTICE OF CROSS-APPEAL

Defendants, Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. hereby cross-appeal to the United States Court of Appeals for the Third Circuit from the Order of the District Court dated April 11, 1988, awarding post-judgment interest to plaintiffs in the amount of $2,632,886.30.

/s/
RICHARD P. McELROY
ANN B. LAUPHEIMER

BLANK, ROME, COMISKY
& McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500

OF COUNSEL:

Stephen B. Ringwood, Esq.

Kaiser Aluminum & Chemical Corp.
300 Lakeside Drive
Oakland, CA 94643
(415) 271-3209

DATED: May 11, 1988

COMMONWEALTH OF PENNSYLVANIA :
:
COUNTY OF PHILADELPHIA :

AFFIDAVIT OF CHARLES J. O'DONNELL

Charles J. O'Donnell submits this Affidavit in support of Plaintiffs' appeal in *Joseph A. Bonjorno, et al. v. Kaiser Aluminum & Chemical Corporation, et al.*, No. 88-1318 (3d Cir.), and being duly sworn according to law deposes and says:

1. I, Charles J. O'Donnell, am controller of Duane, Morris & Heckscher.

2. My job duties include overseeing all accounting and financial activities at Duane, Morris & Heckscher.

3. I have a B.S. Degree in Accounting from Drexel University and I am a certified public accountant in Pennsylvania.

4. I have made certain calculations of the interest on certain principal amounts in connection with Plaintiffs' Brief on appeal in support of their claim for interest on the judgment. My calculation are set forth in the computer printouts attached to this Affidavit as Exhibits A and B. These printouts accurately reflect the calculations made by me as described in this Affidavit.

5. As reflected in Exhibit A, I computed interest on the principal amount of $9,567,939 from August 16, 1979 through June 13, 1988, using the monthly average prime rate supplied by Fidelity Bank, compounded monthly, accounting for payment of $9,567,939 against the principal on July 3, 1986. Under these assumptions, the total amount due as of June 13, 1988 would be $17,080,036.78. Interest continues to run at a rate of $4,250 per day.

6. As reflected in Exhibit B, I computed interest on the principal amount of $9,567,939 from August 16, 1979 through June 13, 1988, using the federal T-Bill rate, as of

August 15, 1979, of \$10.05%, compounded *annually*, accounting for a payment against principal in the amount of \$9,567,939 on July 3, 1986. Under these assumptions, the total amount due as of June 13, 1988 would be \$10,823,335.65. Interest continues to run at a rate of \$2,851.37 per day.

7. I have reviewed Exhibits A and B to this Affidavit and they accurately reflect the calculations made by me as described in this Affidavit.

/s/ CHARLES J. O'DONNELL
Charles J. O'Donnell

Sworn to and Subscribed
before me this 13th day
of June, 1988.

/s/ KAREN A. GILLIAM
Notary Public
KAREN A. GILLIAM
Notary Public, Phila., Phila. Co.
My Commission Expires June 3, 1991

Exhibit A

INTEREST AT PRIME RATE

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
Principal				9,567,939.00
16-Aug-79	9,567,939.00	11.91%	50,529.57	9,618,468.57
01-Sep-79	9,618,468.57	12.90%	103,398.54	9,721,867.11
01-Oct-79	9,721,867.11	14.39%	120,491.42	9,842,358.53
01-Nov-79	9,842,358.53	15.55%	127,540.56	9,969,899.09
01-Dec-79	9,969,899.09	15.30%	131,381.22	10,101,280.31
01-Jan-80	10,101,280.31	15.25%	132,677.43	10,233,957.74
01-Feb-80	10,233,957.74	15.63%	128,826.21	10,362,783.95
01-Mar-80	10,362,783.95	18.31%	163,430.79	10,526,214.74
01-Apr-80	10,526,214.74	19.77%	173,419.39	10,699,634.13
01-May-80	10,699,634.13	16.57%	152,703.90	10,852,338.03
01-Jun-80	10,852,338.03	12.63%	114,220.86	10,966,558.89
01-Jul-80	10,966,558.89	11.48%	108,427.76	11,074,986.65
01-Aug-80	11,074,986.65	11.12%	106,065.48	11,181,052.13
01-Sep-80	11,181,052.13	12.23%	113,953.56	11,295,005.69
01-Oct-80	11,295,005.69	13.79%	134,150.65	11,429,156.34
01-Nov-80	11,429,156.34	16.06%	152,960.21	11,582,116.55
01-Dec-80	11,582,116.55	20.35%	203,017.56	11,785,134.11
01-Jan-81	11,785,134.11	20.16%	204,646.91	11,989,781.02
01-Feb-81	11,989,781.02	19.43%	181,095.00	12,170,876.02
01-Mar-81	12,170,876.02	18.05%	189,219.80	12,360,095.82
01-Apr-81	12,360,095.82	17.15%	176,646.37	12,536,742.19
01-May-81	12,536,742.19	19.61%	211,757.66	12,748,499.85
01-Jun-81	12,748,499.85	20.03%	212,793.71	12,961,293.56
01-Jul-81	12,961,293.56	20.39%	227,639.21	13,188,932.77
01-Aug-81	13,188,932.77	20.50%	232,887.23	13,421,820.00
01-Sep-81	13,421,820.00	20.08%	224,591.79	13,646,411.79
01-Oct-81	13,646,411.79	18.45%	216,862.65	13,863,274.44
01-Nov-81	13,863,274.44	16.84%	194,547.95	14,057,822.39
01-Dec-81	14,057,822.39	15.75%	190,700.75	14,248,523.14
01-Jan-82	14,248,523.14	15.75%	193,287.69	14,441,810.83
01-Feb-82	14,441,810.83	16.56%	185,925.38	14,627,736.21
01-Mar-82	14,627,736.21	16.50%	207,883.17	14,835,619.38
01-Apr-82	14,835,619.38	16.50%	203,989.77	15,039,609.15
01-May-82	15,039,609.15	16.50%	213,736.53	15,253,345.68
01-Jun-82	15,253,345.68	16.50%	209,733.50	15,463,079.18
01-Jul-82	15,463,079.18	16.26%	216,557.56	15,679,636.74

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Aug-82	15,679,636.74	14.39%	194,331.16	15,873,967.90
01-Sep-82	15,873,967.90	13.50%	178,582.14	16,052,550.04
01-Oct-82	16,052,550.04	12.52%	173,094.32	16,225,644.36
01-Nov-82	16,225,644.36	11.85%	160,228.24	16,385,872.60
01-Dec-82	16,385,872.60	11.50%	162,291.49	16,548,164.09
01-Jan-83	16,548,164.09	11.16%	159,052.43	16,707,216.52
01-Feb-83	16,707,216.52	10.98%	142,636.25	16,849,852.77
01-Mar-83	16,849,852.77	10.50%	152,372.91	17,002,225.68
01-Apr-83	17,002,225.68	10.50%	148,769.47	17,150,995.15
01-May-83	17,150,995.15	10.50%	155,096.13	17,306,091.28
01-Jun-83	17,306,091.28	10.50%	151,428.30	17,457,519.58
01-Jul-83	17,457,519.58	10.50%	157,868.03	17,615,387.61
01-Aug-83	17,615,387.61	10.89%	165,213.21	17,780,600.82
01-Sep-83	17,780,600.82	11.00%	162,988.84	17,943,589.66
01-Oct-83	17,943,589.66	11.00%	169,991.56	18,113,581.22
01-Nov-83	18,113,581.22	11.00%	166,041.16	18,279,622.38
01-Dec-83	18,279,622.38	11.00%	173,175.02	18,452,797.40
01-Jan-84	18,452,797.40	11.00%	174,815.62	18,627,613.02
01-Feb-84	18,627,613.02	11.00%	165,036.21	18,792,649.23
01-Mar-84	18,792,649.23	11.21%	181,434.65	18,974,083.88
01-Apr-84	18,974,083.88	11.93%	188,634.02	19,162,717.90
01-May-84	19,162,717.90	12.39%	204,485.30	19,367,203.20
01-Jun-84	19,367,203.20	12.60%	203,355.63	19,570,558.83
01-Jul-84	19,570,558.83	13.00%	219,120.95	19,789,679.78
01-Aug-84	19,789,679.78	13.00%	221,574.33	20,011,254.11
01-Sep-84	20,011,254.11	12.97%	216,288.30	20,227,542.41
01-Oct-84	20,227,542.41	12.58%	219,158.63	20,446,701.04
01-Nov-84	20,446,701.04	11.77%	200,548.06	20,647,249.10
01-Dec-84	20,647,249.10	11.06%	196,672.22	20,843,921.32
01-Jan-85	20,843,921.32	10.61%	190,466.15	21,034,387.47
01-Feb-85	21,034,387.47	10.50%	171,730.88	21,206,118.35
01-Mar-85	21,206,118.35	10.50%	191,766.54	21,397,884.89
01-Apr-85	21,397,884.89	10.50%	187,231.49	21,585,116.38
01-May-85	21,585,116.38	10.31%	191,661.23	21,776,777.61
01-Jun-85	21,776,777.61	9.78%	177,480.74	21,954,258.35
01-Jul-85	21,954,258.35	9.50%	179,621.67	22,133,880.02
01-Aug-85	22,133,880.02	9.50%	181,091.27	22,314,971.29
01-Sep-85	22,314,971.29	9.50%	176,660.19	22,491,631.48
01-Oct-85	22,491,631.48	9.50%	184,018.26	22,675,649.74
01-Nov-85	22,675,649.74	9.50%	179,515.56	22,855,165.30
01-Dec-85	22,855,165.30	9.50%	186,992.56	23,042,157.86

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Jan-86	23,042,157.86	9.50%	188,522.46	23,230,680.32
01-Feb-86	23,230,680.32	9.50%	171,603.75	23,402,284.07
01-Mar-86	23,402,284.07	9.10%	183,406.02	23,585,690.09
01-Apr-86	23,585,690.09	8.83%	173,551.37	23,759,241.46
01-May-86	23,759,241.46	8.50%	173,924.93	23,933,166.39
01-Jun-86	23,933,166.39	8.50%	169,526.60	24,102,692.99
01-Jul-86	24,102,692.99	8.16%	10,892.03	24,113,585.02
03-Jul-86	24,113,585.02			
24,113,585.02 - 9,567,939.00 = 14,545,646.02 Interst through 7/3/86				
04-Jul-86	14,545,646.02	8.16%	92,295.49	14,637,941.51
01-Aug-86	14,637,941.51	7.90%	99,589.57	14,737,531.08
01-Sep-86	14,737,531.08	7.50%	92,109.57	14,829,640.65
01-Oct-86	14,829,640.65	7.50%	95,784.72	14,925,425.37
01-Nov-86	14,925,425.37	7.50%	93,283.91	15,018,709.28
01-Dec-86	15,018,709.28	7.50%	97,005.91	15,115,715.19
01-Jan-87	15,115,715.19	7.50%	97,632.48	15,213,347.67
01-Feb-87	15,213,347.67	7.50%	88,726.08	15,302,073.75
01-Mar-87	15,302,073.75	7.50%	98,836.17	15,400,909.92
01-Apr-87	15,400,909.92	7.73%	99,207.53	15,500,117.45
01-May-87	15,500,117.45	8.14%	108,659.47	15,608,776.92
01-Jun-87	15,608,776.92	8.25%	107,310.34	15,716,087.26
01-Jul-87	15,716,087.26	8.25%	111,662.47	15,827,749.73
01-Aug-87	15,827,749.73	8.25%	112,455.83	15,940,205.56
01-Sep-87	15,940,205.56	8.70%	115,566.49	16,055,772.05
01-Oct-87	16,055,772.05	9.07%	125,415.80	16,181,187.85
01-Nov-87	16,181,187.85	8.78%	118,392.36	16,299,580.21
01-Dec-87	16,299,580.21	8.75%	122,827.70	16,422,407.91
01-Jan-88	16,422,407.91	8.75%	123,753.28	16,546,161.19
01-Feb-88	16,546,161.19	8.51%	113,415.16	16,659,576.35
01-Mar-88	16,659,576.35	8.50%	121,953.21	16,781,529.56
01-Apr-88	16,781,529.56	8.50%	118,869.17	16,900,398.73
01-May-88	16,900,398.73	8.84%	128,665.35	17,029,064.08
01-Jun-88	17,029,064.08	9.00%	50,972.70	17,080,036.78
13-Jun-88	17,080,036.78			

Breakdown of Interest

Interest on Judgement from 8/16/79 to 7/3/86	$14,545,646.02
Interest on compound interest of $14,545,646.02 from 7/4/86 to 6/13/88 ($17,080,036.78 - 14,545,646.02)	2,534,390.76
TOTAL	$17,080,036.78

Exhibit B

INTEREST AT FEDERAL T-BILL RATE (8/15/79)

Period	Prior Balance	Rate	Interest Through End of Year (Period)	Total
Principal				9,567,939.00
16-Aug-79	9,567,939.00	10.05%	363,555.47	9,931,494.47
01-Jan-80	9,931,494.47	10.05%	998,115.19	10,929,609.66
01-Jan-81	10,929,609.66	10.05%	1,098,425.77	12,028,035.43
01-Jan-82	12,028,035.43	10.05%	1,208,817.56	13,236,852.99
01-Jan-83	13,236,852.99	10.05%	1,330,303.73	14,567,156.72
01-Jan-84	14,567,156.72	10.05%	1,463,999.25	16,031,155.97
01-Jan-85	16,031,155.97	10.05%	1,611,131.17	17,642,287.14
01-Jan-86	17,642,287.14	10.05%	888,953.76	18,531,240.90
03-Jul-86	18,531,240.90			
18,531,240.90 - 9,567,939.00 = 8,963,301.90 Interest through 7/3/86				
04-Jul-86	8,963,301.90	10.05%	446,703.95	9,410,005.85
01-Jan-87	9,410,005.85	10.05%	945,705.59	10,355,711.44
01-Jan-88	10,355,711.44	10.05%	467,624.21	10,823,335.65
13-Jun-88	10,823,335.65			

Breakdown of Interest	
Interest on Judgment from 8/16/79 to 7/3/86	$ 8,963,301.90
Interest on compound interest of $8,963,301.90 from 7/4/86 to 6/13/88 ($10,823,335.65 - 8,963,301.90)	1,860,033.75
TOTAL	$10,823,335.65

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,
Appellants No. 88-1318

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Appellants No. 88-1396

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN AND NYGAARD, *Circuit Judges*

The petitions for rehearing filed by appellants in No. 88-1318 and appellants in No. 88-1396 having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

Judge Stapleton would have granted rehearing in banc for the reason set forth in his dissent. Judge Becker and Judge Hutchinson would also have granted rehearing in banc.

By the Court,

/s/
Circuit Judge

Dated: February 13, 1989

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 19, 1989

Mr. Richard P. McElroy
Blank, Rome, Comisky, McCauley
1200 Four Penn Center Plaza
Philadelphia, PA 19103

Re: Kaiser Aluminum & Chemical Corporation, et al.,
v. Joseph A. Bonjorno, et al.
No. 88-1595
Joseph A. Bonjorno, et al.,
v. Kaiser Aluminum & Chemical Corporation, et al.
No. 88-1771

Dear Mr. McElroy:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted.

Very truly yours,

/s/
Joseph F. Spaniol, Jr., Clerk

No. 88-1771

(5)

Supreme Court, U.S.
FILED
AUG 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

JOSEPH A. BONJORNO, LORRAINE KERR,
(EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.,)
AND BARBARA K. CLISBY,

Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION
and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR CROSS-PETITIONERS ON THE MERITS OF PLAINTIFFS' CROSS-PETITION

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STATEMENT OF QUESTIONS PRESENTED BY PLAINTIFFS – APPELLANTS BELOW

1. *Time Period Of Interest*: Should not the *time period* for interest on a judgment run from the date of the original judgment (when defendants' liability was established), where subsequent recalculation of damages (at defendants' request) does not include any adjustment or increment to account for the time value of money for any period after the original judgment?

Thus, in this antitrust action in which Plaintiffs in 1979 established defendants' liability under the antitrust laws for destroying their business in the early and mid-1970's, did not the Court of Appeals err in denying Plaintiffs 2-1/2 years of interest on their $9,567,939 judgment, by limiting interest to the period from the date when Plaintiffs' damages were finally recalculated upwards, instead of from when liability was fixed for the first and only time?

2. *Rate of Interest*: Did not the Court of Appeals, in setting the *rate of interest* have the power (inherent, equitable and under Fed. R. App. P. 37) to award interest at commercial free market rates (monthly average prime, compounded monthly) sufficient to cover the actual diminution in the value of the judgment over the period of post-trial and appellate delay?

Did not the Court of Appeals err in applying the statute for mandatory interest in routine execution on federal district court judgments, 28 U.S.C. §1961, as amended, which provides only for fixed Treasury Bill rate (2 to 3 points below prime), and compounded only annually? – and where, over the ten years of post-trial and appellate delay, the shortfall to the injured Plaintiffs and

the windfall to the wrongdoing Defendants, between market rate ($18.6 million) and 28 U.S.C. § 1961 ($11.9 million), amounts to $6,676,727 or 35.8% of the market rate interest.

LIST OF PARTIES AND RULE 28.1 STATEMENT

1. *Plaintiffs*

Cross-Petitioners Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.) and Barbara K. Clisby ("Plaintiffs"), are the former shareholders and trustees in liquidation of the original Plaintiff below: Columbia Metal Culvert Company of Vineland, New Jersey. Pursuant to Supreme Court Rule 28.1, Plaintiffs state that they have no other corporate affiliations.

2. *Kaiser*

Cross-Respondents and original Petitioners are Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser"), who were defendants in the antitrust action below.

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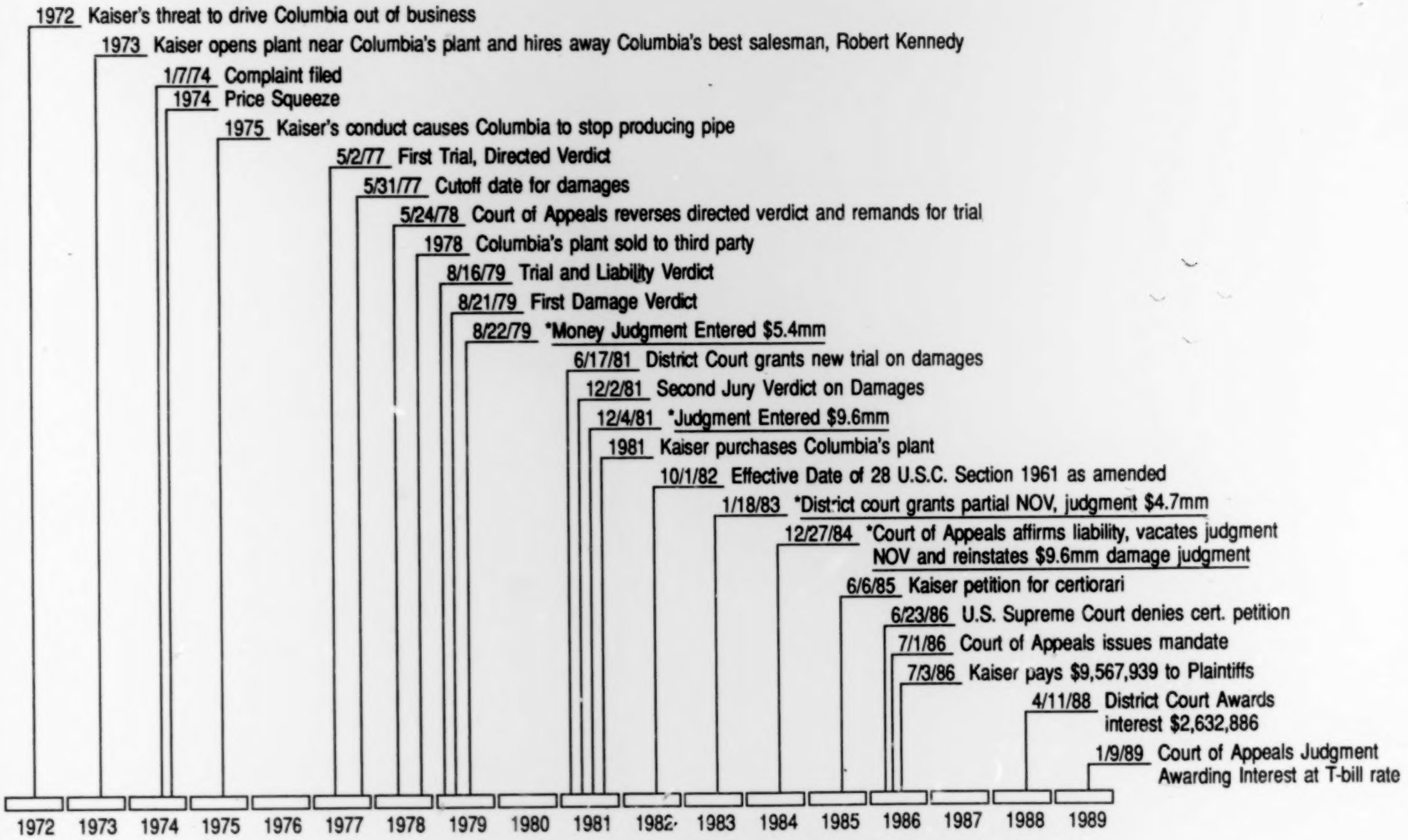
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BONJORNO TIME LINE



*denotes the various "judgments" entered in this case

OPINIONS BELOW

The instant claim for interest arises out of a complex and protracted treble damage antitrust action. The Complaint was filed in January 1974.[1] The Judgment and Opinion of the Court of Appeals dated January 9, 1989, awarding interest, are reproduced at Kaiser's Pet. A-1 and Pet. A-3, respectively. The Opinion, as amended, is reported at 865 F.2d 566 (3d Cir. 1989). The Opinion of the District Court on interest dated April 11, 1988, is reproduced at Pet. A-31.

This Court denied certiorari twice on the substantive issues underlying the interest issues in this case.[2] The opinions on the merits of the antitrust claim are relevant only to the extent they form the factual basis for the interest rulings at issue.[3]

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[1] Attached in the Appendix to the Cross-Petition, and reproduced for the convenience of the Court on the opposite page, is a document entitled "Bonjorno Time Line" which succinctly identifies the principal opinions and events in the extraordinary and prolonged history of this case.

[2] *Kaiser Aluminum & Chemical Corp. v. Columbia Metal Culvert Co.*, 439 U.S. 876 (1978); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 477 U.S. 908 (1986).

[3] The Opinion of the Court of Appeals on the merits of the antitrust claim, dated December 27, 1984, is reproduced at J.A. 185, and is reported at 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).

The Opinions of the District Court on the merits of the antitrust claim are reported at 518 F. Supp. 102 (E.D. Pa. 1981) and 559 F. Supp. 922 (E.D. Pa. 1983) and are reproduced at J.A. 92 and J.A. 147, respectively.

The Opinion of the Court of Appeals in an earlier appeal decided on May 24, 1978, is reported at 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

A pretrial appeal on a collateral issue, where Plaintiffs prevailed, is reported at 526 F.2d 724 (3d Cir. 1975).

JURISDICTION

The judgment of the Court of Appeals on interest was entered on January 9, 1989. Cross-Petitions for rehearing and rehearing *in banc* were denied by Order dated February 13, 1989. Pet. A-29. Kaiser filed a Petition for a Writ of Certiorari on March 30, 1989. No. 88-1595. Kaiser invoked the jurisdiction of this Court under 28 U.S.C. §1254(1).

Plaintiffs received Kaiser's petition in No. 88-1595 on March 30, 1989 and filed a Cross-Petition invoking the jurisdiction of this Court under 28 U.S.C. §1254(1) and Supreme Court Rule 19.5, on April 28, 1989. The Cross-Petition was timely filed both under Rule 19.5 within 30 days of receipt of Kaiser's Petition and under 28 U.S.C. §2101(c) and Rule 20.4 within 90 days of the denial of rehearing by the Court of Appeals.

RULES OF COURT AND STATUTES INVOLVED

This case involves Fed. R. App. P. 37 and 28 U.S.C. §1961, which are set forth in their entirety in the Appendix to this Brief.

STATEMENT OF THE CASE

Kaiser – by delay caused by its post-trial motions – has retained over ten years' interest (from August 1979), on Plaintiffs' multimillion dollar judgment. In the commercial marketplace, Kaiser would have had to pay $18.6 million for this use of Plaintiffs' money. Plaintiffs seek interest commensurate with this economic reality to compensate them for the loss of the time value of money sustained due to Kaiser's post-trial motions and to afford them the full and ample relief which they were awarded, and to which they are entitled, under the antitrust laws.

A. Kaiser Used Predatory Tactics And Abused Its Monopoly Power To Destroy Plaintiffs' Business

Kaiser, a large international integrated manufacturer of aluminum products, was found liable in August 1979 for deliberately destroying Plaintiffs' relatively small competing

business, Columbia Metal Culvert Co., Inc. ("Columbia"), to strengthen and maintain its monopoly. J.A. 185-206. *See* Bonjorno Time Line, Cross-Pet. A-1.

By May 1977, when this case first went to trial,[4] Kaiser had effectively driven Columbia out of business.[5] J.A. 105-106. The first trial in 1977 resulted in a directed verdict in favor of Kaiser, which was reversed by the Court of Appeals, holding that Plaintiffs presented proper evidence showing intentional, predatory conduct in violation of the antitrust laws. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 31 (3d Cir. 1978) (Adams, J., for a unanimous panel).

This Court denied Kaiser's petition for certiorari. *Kaiser Aluminum & Chemical Corp. v. Columbia Metal Culvert Co., Inc.*, 439 U.S. 876 (1978).

But for this error by the District Court incorrectly granting a directed verdict, Plaintiffs would have obtained a judgment in their favor in May 1977 and interest would run from that date.

In August 1979, in a retrial on remand, the jury found that Kaiser monopolized the market for fabricated aluminum culvert pipe, and intentionally destroyed Plaintiffs' business by its predatory and anticompetitive conduct. J.A. 87-89. On August 22, 1979, a judgment was entered in favor of Plaintiffs and against Kaiser in the trebled amount of $5,445,000. J.A. 91.

The August 1979 liability finding, modified to incorporate the higher amount of damages awarded in a subsequent retrial limited only to damages (which only Kaiser had requested), was affirmed by the Court of Appeals on December 27, 1984. J.A. 206. Former Chief Circuit Judge Seitz in a

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[4] There was some delay in completion of pre-trial discovery because the District Court erroneously dismissed one of the Defendants, and Plaintiffs were forced to pursue an appeal to obtain a reversal of that ruling. *Columbia Metal Culvert Co. v. Kaiser Industries Corp.*, 526 F.2d 724 (3d Cir. 1975).

[5] In January 1974, Columbia had filed its complaint to seek redress under the antitrust laws. J.A. 1. The complaint was based on conduct by Kaiser and injuries to Plaintiffs dating back to at least 1971. J.A. 95. By 1975, Kaiser's predatory conduct had forced Plaintiffs to stop producing new aluminum culvert pipe. J.A. 91; *cf.* J.A. 132.

unanimous panel opinion, specifically found sufficient evidence that justified the jury to conclude "that Kaiser * * * exercised [its] power to destroy its competition." J.A. 197.[6] As the Court of Appeals noted: "The Plaintiffs' basic injury was that Columbia was driven out of business." J.A. 201.

In affirming the August 22, 1979 liability judgment, the Court's opinion summarized the issue succinctly and sharply:

> When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for the finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act.

J.A. 197.

As of August 22, 1979, Plaintiffs had established Kaiser's liability for intentionally destroying their business over the period from 1971 to 1977 in violation of the antitrust laws, and had obtained a multimillion dollar judgment in their favor against Kaiser. Kaiser's liability was repeatedly affirmed in response to all of Kaiser's post-trial motions and appeals, and although the amount of damages was subsequently recalculated at Kaiser's request, the second jury emphatically reaffirmed the damages by awarding an even higher amount than the first jury had awarded for Kaiser's

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[6] Judge Seitz summarized a portion of the testimony regarding Kaiser's predatory conduct as follows:

> There was testimony that Holmes Collins [in 1972] the Kaiser manager of the division that manufactured and marketed the aluminum pipe, threatened to open a pipe fabrication plant "across the street" from Columbia if it purchased its raw materials from other sources. There were threats that if Kaiser saw so much as one pound of metal from another producer that it would terminate its relationship with Columbia. When Columbia did purchase aluminum from another company, Kaiser carried through with its threats by locating a pipe plant only 40 miles from Columbia's and by refusing to sell any more coil to Columbia.

J.A. 191-192.

destruction of Plaintiffs' business over the period from 1971 to 1977.[7]

At no time, between 1979 when its liability was established and 1986, did Kaiser tender any sum to Plaintiffs as specifically permitted under Fed. R. Civ. P. 67, to stop or reduce the running of interest. Kaiser, to this day, refuses to tender one penny of interest.

B. Kaiser, Notwithstanding Its Liability For Wrongful Conduct, Has Received Benefits Of More Than $18.6 Million From The Use Of Plaintiffs' Money Due To Delays Occasioned By Its Post-Trial Motions

1. Kaiser's Post-Trial Motions

Kaiser filed post-trial motions, after both the first[8] and the second jury verdicts, which were ultimately unsuccessful.[9]

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[7] *The Award Was Valued As Of 1977*: The December 1981 treble-damage award of $9,567,939, was based upon calculations of damages measured only up to May 31, 1977. J.A. 170 & 170 n.4.

The Interrogatories answered by the first jury on August 21, 1979 specifically found damages valued as of May 31, 1977, or earlier. J.A. 90. In accordance with the District Court's endorsement of Plaintiffs' theory of damages and in conformance with the evidence offered on liability at the 1979 trial, Plaintiffs presented evidence at the 1981 trial on damages *valued as of no later than May 31, 1977*. J.A. 129.

The court deleted the references to May 1977 from the Interrogatories answered by the jury on December 2, 1981, to accommodate Kaiser's contentions that damages should be valued as of 1975 instead of 1977. J.A. 132-133. See also J.A. 136, 145, 170 n.4.

[8] *Kaiser's 1979 Post-Trial Motions*: After the August 22, 1979 judgment, Kaiser filed post-trial motions. The District Court delayed for almost two years until June 17, 1981, when it denied Kaiser's Motion for JNOV and affirmed the liability finding, but granted Kaiser's alternative request for a new trial limited to damages only. J.A. 92, 127. Plaintiffs' motion for reconsideration of this order was denied. J.A. 45. The order could not have been appealed. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam).

[9] *The 1981 Jury Verdict On Retrial Of Damages*: On December 2, 1981, the jury rendered its damage verdict in the retrial on damages,

(Continued on following page)

They did, however, effectively delay for seven years payment of any money whatsoever on its liability established in 1979 for damages to Plaintiffs over the period from 1971 to 1977.

2. Plaintiffs' Petition In 1986 For Interest

On June 24, 1986, prio to issuance of the Court of Appeals' mandate on its December 27, 1984 judgment, Plaintiffs, pursuant to Fed. R. App. P. 37, petitioned for instructions in the Court of Appeals' mandate to cover interest on the recalculated da ge award as reinstated by the court. J.A. 75. Following a stipulation that the District Court should consider the interest issue in the first instance, the Court of Appeals issued its mandate on July 1, 1986 (J.A. 75, 210), and on July 3, 1986, Kaiser paid Plaintiffs $9,567,939.

The District Court did not issue its ruling on interest for some 21 months, until April 11, 1988 (J.A. 58-59 (docket entries)), awarding only $2,632,886 at 6% simple interest, under Pennsylvania law following the old version of 28 U.S.C. §1961, that had been repealed in 1982 when the Congress authorized T-bill rate interest on routine federal District Court judgments. Pet. A-31 (Opinion). The Cross-

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(Continued from previous page)

based on the liability finding of August 1979. J.A. 145. On December 4, 1981 the District Court entered judgment in the trebled amount of $9,567,939. J.A. 146.

Kaiser's Second Post-Trial Motions in 1981, And Reinstatement By The Third Circuit Of The Jury's Award: Following the 1981 retrial on damages, Kaiser again filed extensive post-trial motions. J.A. 47-50, 150-151. After delaying more than another year, the District Court granted, in part, Kaiser's Motion for JNOV, reduced the amount of the judgment, and entered a final appealable judgment on January 18, 1983. J.A. 184.

On cross-appeals, after almost two more full years, on December 27, 1984, the Third Circuit affirmed the liability finding from the August 16, 1979 verdict and the August 22, 1979 judgment and reinstated the full judgment in the amount of $9,567,939. J.A. 185.

On June 23, 1986, this Court denied Kaiser's petition for certiorari. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 477 U.S. 908 (1986).

Appeals of that order resulted in the Court of Appeals' judgment of January 9, 1989 which is the subject of this Court's writ of certiorari (*see* ¶ C below pp. 9-10).

3. Abnormally High Market Interest Rates Result In Kaiser's Unjust Enrichment At Plaintiffs' Expense

The time over which Kaiser delayed its ultimate day of reckoning was a time of abnormally high inflation and high interest rates, with the prime rate peaking over 20%. Reitz, *Interest on Judgments in Federal Litigation* (1986), at J.A. 212;[10] *see also* J.A. 303-308. Measured at a conservative market calculation for commercial borrowers[11] (monthly average prime rates, compounded monthly), interest on $9,567,939 from August 1979 through the date of the briefs filed with the Court of Appeals (June 13, 1988), and accounting for Kaiser's payment of $9,567,939 on July 3, 1986, would yield interest due in excess of $17 million, with interest continuing to accrue at $4,250 per day. J.A. 303.[12]

4. Interest Under 28 U.S.C. §1961, As Amended, Is Significantly Less Than Commercial Free Market Rates

Because treasury bills represent short-term borrowings of the most creditworthy debtor – the federal government –, the

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[10] Reproduced in the Joint Appendix, beginning at J.A. 212, is a scholarly analysis of application of 28 U.S.C. §1961 in federal litigation prepared by Curtis R. Reitz, Algernon Sydney Biddle Professor of Law University of Pennsylvania, at Plaintiffs' request in October 1986, which Plaintiffs submitted to the District Court. References to Professor Reitz' analysis are set forth as "Reitz, J.A. ___."

[11] Because of delay in collection of the judgment, Plaintiffs' own debts remaining from the business Kaiser destroyed continued to accrue interest at 2.5% *above* Philadelphia National Bank's daily prime rate or 3% *above* average monthly commercial paper rate, *whichever rate was higher, compounded monthly.* J.A. 290-291.

[12] As of today, that $17 million has increased to over $18.6 million.

rates of interest they bear are typically 2 to 3 percentage points below the prime rates of interest that represent the cost of money to the most creditworthy private businesses.[13] In addition, compounding only once a year as provided in 28 U.S.C §1961(b) undervalues the actual cost of money, because interest in the free market is typically compounded at least monthly in business loans. See Reitz, J.A. 231; *see also* note 11 above & pp. 43-44 below.

The rule of convenience established for interest on run-of-the-mill federal District Court judgments in 28 U.S.C. §1961 provides for a single fixed treasury bill rate to apply over the entire period over which interest runs, irrespective of how the true rate fluctuates, up or down. By contrast, the cost of money in the commercial lending marketplace is typically measured by floating interest rates set at a particular number of percentage points above prime. *See, e.g.*, note 11 above & p. 44 & nn.71-72 below.

The difference between interest at a fixed sub-market rate and interest at fluctuating commercial market rates is likely to become significantly pronounced in cases in which stays of execution and post-trial and appellate proceedings delay execution for many years during periods of particularly high and volatile inflation and interest rates. Thus, computing interest from August 1979, (up to the date of Plaintiffs' opening Brief before the Court of Appeals June 13, 1988), the shortfall between commercial market rate interest (monthly average prime, compounded monthly: $17,080,036) and interest at the federal T-bill rate (fixed 10.05%, compounded annually: $10,823,335) amounted to $6,256,701. *See* J.A. 303-304. That results in a shortfall of approximately 36% of the market measure.[14]

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[13] *See* Reitz, J.A. 231; *see also* pp. 42-43 & nn.69-70 below pointing out how the Congress, when it amended 28 U.S.C. §1961 in 1982, backed away, at the request of Budget Director Stockman, from the original draft providing interest at *prime rate*.

[14] As of August 3, 1989, the date of this Brief, the market rate interest has mounted to $18,637,022, while the T-bill interest has grown to only $11,963,588, leaving a shortfall of $6,673,434 – or 35.8%

C. The Judgment Of The Court Of Appeals

In determining the appropriate interest on its December 27, 1984 judgment, the Court of Appeals:

(1) denied as "without merit,"[15] Plaintiffs' request that interest be calculated at monthly average prime rates, compounded monthly, from August 1979, which would have returned to Plaintiffs the full value of their judgment in an award of interest as of June 1988 in excess of $17 million;

(2) denied Plaintiffs' request for 2-1/2 years of interest from August 1979, and instead held that interest should begin to run only as of December 2, 1981, the date of the damage verdict on the retrial on damages;

(3) rejected Kaiser's contention that interest should only run from the date of issuance of the Court of Appeals mandate on July 1, 1986 following denial by this Court on June 23, 1986 of Kaiser's petition for certiorari; and

(4) held that, on the facts and equities of this case, application of current law, which has now been in effect over six years, does not result in "manifest injustice"; – and therefore the amount of interest is determined by the current version of 28 U.S.C. §1961, rather than the

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[15] The Court of Appeals rejected Plaintiffs' position in one sentence with no discussion:

> We have considered Bonjorno's argument that a "market rate" of interest should apply; however, we find the argument to be without merit.

865 F.2d at 572, n.10, Pet. A-14 n.11. From the Court of Appeals' discussion of 28 U.S.C. §1961, rejection of Plaintiffs' argument must have been based on the Court of Appeals' perception that it lacked the power to make such an award, and felt bound by the provisions of the federal interest statute, 28 U.S.C. §1961, which by its terms only applies to District Court judgments.

version repealed by Congress over seven years ago.

The Court of Appeals, by the foregoing holdings, denied Plaintiffs interest over the period between the first judgment in their favor and the second judgment. This took away from the injured Plaintiffs, and granted to the predatory monopolist, a free ride on 2-1/2 years of interest on a multimillion dollar judgment.

The court below also denied Plaintiffs' request for interest at free market rates that would accurately measure the time value of money, apparently believing – and we submit, wrongly – that it was constrained by the rate set forth in 28 U.S.C. §1961 for calculation of interest by the clerk's office in execution on federal District Court judgments in run-of-the-mill cases.

D. This Court's Granting Of Certiorari On Cross-Petitions

Kaiser filed a petition for a writ of certiorari contending that the Court of Appeals erred in allowing interest at the federal T-bill rate provided in 28 U.S.C. §1961 as amended, rather than the 6% simple interest rate under a Pennsylvania statute Kaiser proposed pursuant to the version of §1961 repealed by Congress in 1982. No. 88-1595. Kaiser also contended that the Court of Appeals erred in allowing interest to run from December 2, 1981.

Plaintiffs filed this cross-petition (No. 88-1771), respectfully contending that the Court of Appeals:

(1) erred in denying Plaintiffs 2-1/2 years of interest from their original judgment in August 1979 to December 2, 1981;

(2) failed to recognize and act upon its power (inherent, equitable and under Fed. R. App. P. 37) to award adequate interest to preserve the value of the judgment over long periods of post-trial and appellate delays; and

(3) erred in denying market rate interest and limiting Plaintiffs to inadequate interest which would grant Kaiser unjust enrichment from delay at Plaintiffs' expense.

On June 19, 1989, this Court granted both petitions. J.A. 311.[16]

SUMMARY OF ARGUMENT

1. *The Facts*, underlying this dispute for full market interest (as to *time period*, *rate* and *principal amount* where there is a recalculation of the damage award), are sharply etched (*See* Bonjorno Time Line, opposite p.1) and not in dispute:

Beginning some 18 years ago, Kaiser, a large fully integrated manufacturer of aluminum products, abused its monopoly power through a series of intentional and viciously unfair predatory acts, and undertook to and did destroy the Plaintiffs' small competing business as a fabricator of aluminum highway drainage pipe.

If Kaiser prevails on its contention that it owes only two days of interest, it will – by exhausting its judicial remedies – have achieved 10 profitable years of delay, during which it has enjoyed the use of Plaintiffs' money, and has profited at Plaintiffs' expense in an amount in excess of $18,637,022, which represents 66% of the total sum due[17] as found by the jury.

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[16] The two writs are being briefed on a simultaneous schedule. This Brief on the Merits of Plaintiffs' Cross-Petition is addressed solely to the Plaintiffs' issues in the cross-petition in No. 88-1771. Plaintiffs, as Respondents, will respond to the issues raised in Kaiser's petition in No. 88-1595 in a separate brief.

[17] Interest ($18,637,022) plus the judgment amount ($9,567,939) totals $28,204,961. The interest represents 66% of that total amount.

As of 1979, Kaiser owed Plaintiffs treble damages for destruction of their business over the period from 1971 to 1977. Yet Kaiser did not pay Plaintiffs one penny until 1986 and still refuses to pay any interest whatsoever.

In addition to enjoying the use of Plaintiffs' money over this period, Kaiser has also enjoyed the benefits of its monopoly.

While Kaiser enjoyed the use of Plaintiffs' money, Plaintiffs continued to rack up interest *at 2.5 points above prime* on the debts, which along with the cause of action against Kaiser, were all that remained of Plaintiffs' once thriving business. *See* p. 7 n.11 above.

The facts, as found by the jury, have been confirmed by two different panels in two separate appeals to the Court of Appeals below. This Court, over three years ago, refused to grant certiorari. Meanwhile, Kaiser has paid only a sum equal to the principal amount of the judgment, which it did not pay until 1986. Kaiser continues to fight this case to the bitter end, refusing to tender even one penny of interest, as is specifically provided for in Fed. R. Civ. P. 67 as a means of stopping or diminishing the running of interest.

2. *Underlying Policy Considerations*: If Kaiser succeeds in turning losses into wins through delays in the courts, thereby profiting from the use of Plaintiffs' money, it will send a loud and clear message to other litigants that they too can similarly profit and, in antitrust cases, frustrate national policy, by exhausting their judicial remedies, and in the process exhaust their opponents and the courts as well.

3. *Error By The Court Below*: As will be demonstrated in this Brief (and Plaintiffs' upcoming Brief in reply as Respondents in No. 88-1595) while the Court below properly reversed the trial judge's award of interest (an entirely inadequate $2.6 million under a repealed federal law that looked to the law of the State – *i.e.*, Pennsylvania: simple interest at 6%) it nevertheless erred in two major respects:

First, as to *time period*, it denied Plaintiffs some 2-1/2 years of interest from the date liability was fixed and the original judgment was entered in favor of Plaintiffs (August 1979) until the second trial on damages (December 1981). Kaiser alone sought the retrial on damages and the second jury emphatically reaffirmed the findings of the first, almost doubling the original award. The damages awarded were based solely on the 1979 findings and were still measured only up to 1977, with *no* provision for *any interest* during the interim period.

Second, as to *rate*, it directed that interest should be calculated under a federal statute (intended to apply only to routine writs of execution on judgments of the District Court: 28 U.S.C. §1961 as amended). This statute provides for a fixed interest rate, arbitrarily set based on a single treasury bill auction (some 2 to 3 points below prime), and compounded only once a year.

4. *The Remedy And Relief Sought*: Plaintiffs respectfully ask this Court to now reaffirm and make clear for all Courts of Appeals, that in cases such as this, where there have been extended delays because of the judicial process, they have the power (inherent, equitable and under Fed. R. App. P. 37) to award sufficient interest to carry out the fourfold purposes of interest:

(1) *Preserve judgments* against diminution due to loss of the time value of money;

(2) *Prevent unjust enrichment* by the Defendant who has had the use of Plaintiffs' money;

(3) *Vindicate national antitrust enforcement policy* by ensuring that the *wronged* receive full compensation, without diminution over time, and that the *wrongdoer* pays the full measure of the award against it; and

(4) *Remove any financial incentive* by payment of interest *less than* market rate that encourages litigants to delay payment by exhausting all post-trial and appellate remedies that the judicial process allows.

Thus, Plaintiffs ask that the Court remand with instructions that interest should be awarded from August 22, 1979, when liability was fixed, until payment by Kaiser of all sums due at monthly average prime rates compounded monthly.

ARGUMENT

I. THE HISTORY AND PURPOSES OF COURT AWARDED INTEREST ARE NOT IN DISPUTE

The history of interest is as old as the history of commerce. *See generally* S. Homer, *A History of Interest Rates* (2d ed. 1977).[18] Nevertheless, medieval concepts of usury – a medieval Christian tenet that charging any interest whatsoever for loans was immoral – has tempered and distorted

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[18] Indeed, one of the first codifications of statutory law, the Code of Hammurabi adopted in 1800 B.C. in Babylonia, adopted as legal maxima the millenial customary interest rates of 33 1/3% per annum for grain loans repayable in kind and 20% per annum for silver loans. *Id.* at 29-30.

common law awards of interest by the courts. *See generally National Bank of Commonwealth v. Mechanics' National Bank*, 94 U.S. 437, 438 (1876); *Marshall v. Beeler*, 104 Kan. 32, 178 P. 245 (1919); S. Homer, *A History of Interest Rates*, at 69-72.

This Court, however, has consistently recognized the legitimacy and equity of interest awards and the inherent and equitable power of the courts to award adequate interest to account for the time value of money. *See, e.g., Young v. Godbe*, 15 Wall. (82 U.S.) 562, 565 (1872); *National Bank of Commonwealth v. Mechanics' National Bank*, 94 U.S. 437 (1876); *Billings v. United States*, 232 U.S. 261, 286 (1914); *Miller v. Robertson*, 266 U.S. 243, 256-259 (1924); *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *West Virginia v. United States*, 479 U.S. 305 (1987); *Texas v. New Mexico*, 482 U.S. 124, 132 n.8 (1987).

Thus, more than a century ago the federal courts, by the decisions of this Court, swept aside the undue reluctance to award interest, as expressed in English common law which had been transplanted into the common law of the states. *See generally National Bank*, 94 U.S. at 438. As this Court later stated in *Billings v. United States*, 232 U.S. 261, 287-88 (1914):

> The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, *interest in all cases where equitably due unless forbidden by statute*. (emphasis added).

The Court in *Billings*, explaining its past clear break with the harsh and antiquated common law rule, went on to stress that interest was merely compensation for the use of money and should generally be awarded by federal courts *even in the absence of statutory authority:*

> It would serve no purpose to refer to the abhorrence which obtained in early times concerning the payment of interest and the evolution by which the legitimate character of interest was gradually understood and it came to be recognized that its payment was, as a general principle, but the *compensation due for the use of money* or that its allowance was merely for damages caused by delay in discharging a duty and therefore in default on a contract to pay money even without express legislation so directing, interest would be allowed. * * * Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, *that a statute was not necessary* to compel its payment where in *accordance with the principles of equity and justice* in the enforcement of an obligation, interest should be allowed. (emphasis added).

232 U.S. at 285-86 (citing *Young v. Godbe*, 15 Wall. (82 U.S.) 562, 565 (1872)).

In recent years, as the Federal Reserve Bank has begun to focus on driving up interest rates to regulate the money supply and the economy, traditional 6% legal interest rates have become entirely inadequate to serve their intended purpose to *overestimate* the market value of money to encourage prompt payment of sums due. *See Union Pacific R.R. Co. v. United States*, 11 Ct. Cl. 177 (1986). In this setting, equitable awards of market rate interest by the courts have become all the more important.

The fourfold purposes of interest on court judgments are not in dispute:

(1) *Preserve The Value, and (2) Prevent Unjust Enrichment:* Courts routinely award interest to account for the time value of money, stressing the now time-honored principle that the purpose of such awards is to disgorge the benefits received by the wrongdoer by withholding money rightfully belonging to the victim, and to ensure that neither side enjoys a benefit or suffers a loss due to the delays inherent in the judicial process.[19]

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[19] *See Bruning v. United States*, 376 U.S. 358, 360 (1964) ("interest is considered to be the cost of the use of the amounts owing a creditor and an incentive to prompt repayment and, thus, an integral part of a continuing debt"); *Billings*, 232 U.S. at 285 (payment of interest is "compensation due for the use of money [and] its allowance [is] merely for damages as caused by delay in discharging a duty"); Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1048 (1955) ("Granting the existence of these delays, the real issue is who should bear the cost resulting from the loss of use of money. One party must, and since defendant is the adjudged wrongdoer, this expense properly falls to him.").

(3) *Vindicate National Anti-Monopoly Free And Fair Competition Policy*: Full market rate interest is also required to preserve the full damage award, as trebled,[20] against diminution to implement a national anti-monopoly policy of the Congress (which dates back to 1890), to deter violations, through the private attorney general concept, which encourages treble damage enforcement actions in the Courts.[21] See pp. 19-20 & nn.27-28, & p. 37 n.58 below.

(4) *Eliminate Incentive For Delay*: Finally, as a matter of judicial administration to ensure a prompt and efficient justice system, court awarded interest serves to eliminate incentives for delay.[22] Unless interest awards in cases such as

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[20] Treble damages under 15 U.S.C. §15 are considered to be partially justifiable on compensatory grounds because an antitrust violation often involves numerous intangible economic harms. *See Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 635 (1985) ("the treble-damages cause of action * * * seeks primarily to enable an injured competitor to gain compensation for that injury."); *American Society of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10, 575 (1982); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 & n.10 (1977) ("the treble-damage provision, which makes awards available to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy"); *see also Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 & n.36 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

[21] *See Mitsubishi Motors*, 473 U.S. at 634-35; *Brunswick Corp.*, 429 U.S. at 485 ("treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing"); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); *see also Fishman v. Estate of Wirtz*, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) ("Any erosion of the trebling on account of a denial of interest undermines the deterrent force of the antitrust law.").

[22] *Cf.* Fed. R. App. P. 38; *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 3-4 (1987) (discussing state statutes providing for mandatory penalty for unsuccessful appeal).

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this one fully account for the time value of money, the courts unwittingly encourage incentives for delay, particularly in complex litigation involving large sums of money and requiring extensive use of limited judicial resources.

To implement these four purposes of interest awards, the courts must exercise their power to impose economic reality and award interest at the litigants' cost of money, particularly where the Plaintiffs are prevented from collecting the judgment during stays and post-trial and appellate delays initiated by the defendants.

II. NOTHING SHORT OF FULL MARKET RATE INTEREST FOR THE FULL TIME PERIOD (FROM THE ORIGINAL JUDGMENT OF LIABILITY TO PAYMENT OF ALL PRINCIPAL AND INTEREST) WILL VINDICATE THE POLICY BEHIND INTEREST AWARDS IN THIS CASE

A. *THE TIME PERIOD*: Interest Should Run From The Date Of The Original Judgment In Favor Of Plaintiffs

1. Plaintiffs, Whose Damages Were Measured As Of May 31, 1977, Are Entitled To Interest On The Judgment From August 22, 1979

Kaiser's liability was first and finally determined in August 1979 and was repeatedly affirmed by the courts in all of Kaiser's subsequent challenges. Thus, as of August 1979, Plaintiffs had established in a court of law that Kaiser was

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See also p. 43 n.70 quoting from the Senate Report on the bill to amend 28 U.S.C. §1961 discussing removal of the "economic incentive" for delay because state interest rates under old 28 U.S.C. §1961 were frequently unrealistically low. Pennsylvania's 6% statute represents the lowest non-variable rate in the nation. *See* Note, *The Postjudgment Interest Rate in Pennsylvania: Ignoring Reality For Too Long*, 23 Duq. L. Rev. 1083, 1083-84 (1985).

liable to them for treble damages for the destruction of their business over the period from 1971 to 1977.

Ignoring the original multimillion dollar judgment in favor of Plaintiffs on August 22, 1979, the court below erred in denying Plaintiffs 2-1/2 years of interest from August 1979 to December 1981.[23]

The court below failed to follow the basic, well-established rule, consistent with the purposes of interest awards and precedent in this Court, that interest on the judgment runs from the date of the original judgment in plaintiffs' favor, unless (which are not the facts here, see below p. 5 n.7) subsequent recalculation of damages accounts for the time value of money after the date of the original award.[24]

2. This Court's Precedent Dictates That Interest On The Judgment Runs From The Date Of The Original Judgment

This Court has recognized that interest on the judgment should be awarded from the date of the original judgment over periods of court delay even if the amount of the judgment is subsequently altered.[25] *De La Rama v. De La Rama*, 241 U.S. 154, 159-160 (1916); *Kneeland v. American Loan & Trust Co.*, 138 U.S. 509 (1891); *see also Ex parte Republic of*

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[23] To the extent Kaiser has contended, or may contend, that "error of the court" is determinative of the date interest begins to run, then interest should be awarded as of May 1977, for this is when the District Court wrongly granted a directed verdict in favor of Kaiser.

But for the court's error, judgment would have been entered in Plaintiffs' favor some 2 years earlier in May 1977. Moreover, the jury's award does not account for the time value of money after that date.

[24] *See Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1299-1300 (9th Cir. 1984) (unanimous panel opinion joined by then Circuit Judge, Mr. Justice Kennedy), *cert. denied*, 469 U.S. 1190 (1985).

[25] See also Section B, pp. 29-30, where we point out that where there has been a recalculation upwards, interest should run on the increased principal amount from the date liability first attached.

Columbia, 195 U.S. 604 (1904); *The Conemaugh*, 189 U.S. 363 (1903). The date the amount of the judgment is definitively determined is not the proper date to begin interest where the damages are valued as of an earlier date.

Some courts' reluctance to allow interest for the period before the final amount due has been definitively determined, stems from an historical anomaly making an unjustified distinction between *liquidated* and *un*liquidated damages. This Court has recognized that distinction as "not a sound one."[26]

While there may be arguments for and against awarding *pre*judgment interest back to the date of the original wrong[27] (i.e., before it has been judicially determined that a wrong occurred) there is certainly no justification for denying interest *after* the date the jury finds (which finding is never

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[26] As this Court stated in *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 168-169 (1933):

> *It has been recognized that a distinction, * * * simply as between cases of liquidated and unliquidated damages, is not a sound one.* [footnote omitted]. Whether the case is of the one class or of the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of the breach and nothing is added for the delay in obtaining the award of damages. *Because of this fact, the rule with respect to unliquidated claims has been in evolution * * ** and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality. (emphasis added).

[27] Indeed, courts in Pennsylvania, where the federal District Court below is located, routinely allow delay damages in *tort* actions for the period from the filing of the complaint or one year after the first injury. Pa. R. Civ. P. 238. *See generally Ceresini v. Valley View Trailer Park, Ephrata, Inc.*, 380 Pa. Super. 416, 552 A.2d 258 (1988) (en banc) (revised Rule 238 applies to pending cases).

Section 4 of the Clayton Act was amended in 1980 to provide for prejudgment interest in certain circumstances for cases filed after 1980. *See* 15 U.S.C. §15(a); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 582-584 (7th Cir. 1986) (Easterbrook, J., dissenting). As Judge Easterbrook persuasively argues, prejudgment interest should be allowed in antitrust cases, and Plaintiffs should be allowed interest on certain sums from 1971.

thereafter set aside) that the wrongdoer unlawfully caused damage in some amount.[28] At that point the Defendant knows it has a damage exposure (albeit in an undetermined amount) that it cannot avoid. Mindful of this very situation, and the ever more prevalent practice of bifurcated trials between liability and damages, the Federal Rules of Civil Procedure wisely give the Defendant the option of stopping or cutting back on the running of interest by tendering what it feels may be its ultimate damage responsibility.[29]

Interest Should Begin To Run When Liability Is Established

Principles of justice and equity, as well as the policy behind court awarded interest, dictate that interest on the judgment should be awarded from the date that liability is established and the jury or the Court determine that the Defendant is liable. *See, e.g., De La Rama*, 241 U.S. at 159.[30] Precedent from the circuits over-

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[28] Plaintiffs have not sought *pre*judgment interest for the period from May 31, 1977 to August 22, 1979, but rather are seeking *post*judgment interest for the period after the original judgment in their favor which is allowed as a matter of course in antitrust cases, as in all cases. *See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1298-1300 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Litton Sys. Inc. v. AT&T*, 746 F.2d 168 (2d Cir. 1984); *see also United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971) (postjudgment interest on treble damages); *cf. Rodgers v. United States*, 332 U.S. 371, 373 n.2 (1947) (regardless of relative equities on prejudgment interest on non-remedial civil penalties, postjudgment interest is provided by statute).

[29] *See* Fed. R. Civ. P. 67, *see also* Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1028-29 (1955); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1022-1023 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985). During the two years while the District Court deliberated on Kaiser's post-trial motions from 1979 to 1981, Kaiser could have tendered the judgment amount to stop interest. Instead, it retained the money, which rightfully belonged to Plaintiffs, and benefited from its use. *Cf. Handgards*, 743 F.2d at 1300 n.28.

[30] In *De La Rama*, the appellant husband challenged the award of interest on the judgment from the date of a divorce decree. In affirming

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whelmingly supports this view.[31] *See Chattem, Inc. v. Bailey*, 108 S. Ct. 2831 (1988) (White, J., dissenting from denial of cert.); *see also Mascuilli v. United States*, 383 F. Supp. 50

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the award and dismissing the writ of error, this Court per Mr. Justice Holmes stated that interest would run from the date of the original decree even though the husband had, through his appeal, succeeded in *reducing* the award:

> [T]hat was the date at which *but for delays of the law* the wife would have received her dues, the husband has had the use of the money meanwhile, and we are not prepared to say that it was not at least within the discretion of the court to allow the charge, *notwithstanding the success of the husband in reducing the amount on appeal.*

241 U.S. at 159 (emphasis added).

[31] *1st Cir.: United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971);

2d Cir.: Smith v. National Railroad Passenger Corp., 856 F.2d 467 (2d Cir. 1988);

3d Cir.: Poleto v. Consolidated Rail Corp., 826 F.2d 1270 (3d Cir. 1987);

4th Cir.: The Kia Ora, 252 Fed. 507 (4th Cir. 1918);

5th Cir.: Nissho-Iwai Co. Ltd. v. Occidental Crude Sales, Inc., 848 F.2d 613, 624 & n.9 (5th Cir. 1988);

6th Cir.: Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988);

7th Cir.: Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1211 (7th Cir. 1989); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 945 (7th Cir. 1984) (per curiam);

8th Cir.: Buck v. Burton, 768 F.2d 285, 287 (8th Cir. 1985);

9th Cir.: Turner v. Japan Lines, Ltd., 702 F.2d 752 (9th Cir. 1983);

10th Cir.: Northern Natural Gas Co. v. Hegler, 818 F.2d 730, 737-38 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988);

11th Cir.: Georgia Association of Retarded Citizens v. McDaniel, 855 F.2d 794, 799 (11th Cir. 1988);

Fed. Cir.: Mathis v. Spears, 857 F.2d 749, 760 (Fed. Cir. 1988).

(E.D. Pa. 1974), *aff'd without opinion*, 519 F.2d 1398 (3d Cir. 1975).[32]

3. Practice In The Lower Courts And The Policies Behind Interest Awards Support Interest From The Original Judgment

Neither 28 U.S.C. §1961, for routine interest on execution of District Court judgments, nor Fed. R. App. P. 37, for interest awards by Courts of Appeals, provides explicit guidance on the date from which interest should be calculated in cases such as the present one in which there are multiple judgments recalculating the amount of damages.[33]

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[32] In *Mascuilli*, some six years *after* the 1968 liability judgment, the District Court, in March 1974, entered a revised damage award for plaintiff in the increased amount of $132,665.

Concluding that the District Court's final *liability* judgment of 1968 constituted the appropriate starting point for the running of interest on the damage award, the Court declared:

> [Plaintiff] became entitled to interest as of the day the final judgment on liability was rendered [in 1968], *and it would be inequitable to impose the costs associated with the use of money on her rather than on the defendant whose wrongful conduct resulted in the invocation of the judicial process and who had use of the money during the pendency of the various appeals.*

Mascuilli, 383 F. Supp. at 53 (citations omitted).

[33] The statutory provision in 28 U.S.C. §1961 mandates that interest shall be calculated "from the date of the entry of the judgment." 28 U.S.C. §1961, unfortunately, does not specify which "judgment" begins the running of interest in the event of multiple judgments recalculating the amount of damages. *See Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 754 (9th Cir. 1983). Under equitable interpretation of the statute, the date from which interest runs can be different from the date of the final judgment vesting plaintiff's right to receive interest. *See* Reitz, J.A. 216, 238; Court of Appeals Opinion, Pet. A-17, A-22.

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As discussed in the section on POWER TO AWARD that follows, there are a number of formulations of the Courts of Appeals' power to grant appropriate interest:

(1) inherent or equitable power of the court;
(2) interpretation of 28 U.S.C. §1961 according to the "equity of the statute"; or
(3) interpretation and application of Fed. R. App. P. 37, independent from, or in conjunction with, 28 U.S.C. §1961.

But irrespective of these nuances, the policy behind court awarded interest dictates a very simple rule, – which would be dispositive of this case, and would provide proper guidance for all other courts in which this issue might arise – *i.e.*, that:

> interest on a judgment should run from the date of the original judgment entered in favor of the judgment creditor, *unless subsequent recalculation of damages accounts for the time value of money after the date of the original judgment.*

See, e.g., Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1299-1300 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).[34]

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Fed. R. App. P. 37 does not specify the appropriate date for commencement of interest in a case such as the present one in which the original liability finding is affirmed but the final judgment of the District Court is modified. This rule allows the court to award interest from the original judgment in favor of a plaintiff as long as there is no double counting of both prejudgment and postjudgment interest for the same period. *E.g., James B. Lansing Sound, Inc. v. National Union Fire Ins. Co.*, 801 F.2d 1560, 1569-1571 (9th Cir. 1986).

If a subsequent calculation of damages does not include an increment accounting for the time value of money after the date of the original judgment, then interest should be awarded from the date of the original judgment. *E.g., Handgards*, 743 F.2d at 1299-1300.

[34] In *Handgards*, the Ninth Circuit upheld a District Court award of postjudgment interest in an antitrust case for the period between an

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This rule, which has been noted by Mr. Justice White,[35] is the majority rule among the Circuits, in cases in which there have been multiple recalculations of damages and the judgment amount,[36] and is consistent with the purpose of court awarded interest:

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original judgment and a new judgment on retrial, in circumstances similar to those in the present case. The Ninth Circuit held:

> Where . . . [interest for the period between two judgments] has not been included in damages, it can be recovered as postjudgment interest.

743 F.2d at 1300.

[35] *Chattem, Inc. v. Bailey*, 108 S. Ct. 2831, 2832 (1988) (White, J., dissenting from denial of certiorari) (noting cases allowing the prevailing plaintiff "postjudgment interest from the date of the original judgment in his favor").

[36] *1st Cir.: United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971) (interest should run from the original liability judgment of June 30, 1969 – even though treble damages assessed on that date had been vacated and subsequently recalculated).

3d Cir.: Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 927 (3d Cir. 1985).

5th Cir.: Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 624 & n.9 (5th Cir. 1988); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc) (fee award should bear postjudgment interest on the increased amount of $244,687.50 from the date of the original award of $45,000).

6th Cir.: Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir. 1988) (interest should run from October 27, 1980 judgment, despite an intervening appeal which had vacated the damage assessment and remanded for retrial of damages), *cert. denied*, 108 S. Ct. 2831 (1988); *United States v. Bank of Celina*, 823 F.2d 911, 914-915 (6th Cir. 1986) (interest over period of delay in District Court).

7th Cir.: Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1211 (7th Cir. 1989).

8th Cir.: Total Petroleum, Inc. v. Davis, 822 F.2d 734 (8th Cir. 1987) (postjudgment interest should run from the date of original judgment but

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¶ *First*, because it compensates for the time value of money between two judgments *only* if the calculation of the subsequent judgment does not already account for the time value of money.

¶ *Second*, failure to award interest for the period between two judgments in these circumstances would improperly impose the cost of delay on the innocent victim rather than the adjudicated wrongdoer where liability has already been established and remains undisturbed, as in the present case.[37]

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on principal amount ultimately determined later after resolution of amount of set off).

9th Cir.: Handgards, 743 F.2d at 1299-1300.

10th Cir.: Compare Northern Natural Gas Co. v. Hegler, 818 F.2d 730, 737-38 (10th Cir. 1987) (postjudgment interest should commence as of the original judgment in 1974, despite reversal and recalculation of damages, where difference between the first and second judgment did not go to any basic issues of liability, but merely was a matter of recalculating damages), *cert. dismissed*, 109 U.S. 28 (1988), *with FDIC v. Rocket Oil Co.*, 865 F.2d 1158, 1161-62 (10th Cir. 1989) (where the original judgment was reversed on basic liability issues – there had never been any verdict or judgment in favor of plaintiff until the reversal on appeal – postjudgment interest should not run from District Court judgment in favor of defendant reversed on appeal).

[37] In *Handgards*, the original judgment was vacated in its entirety and subsequently retried for both liability and damages. *See also Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980).

The present case, however, presents an even *more compelling* basis for an award of interest over the entire period between the 1979 judgment and the 1981 judgment, because the *1979 judgment as to liability was never disturbed or overturned and was affirmed by the Court of Appeals in 1984*.

The District Court allowed a retrial limited to damages only, at Kaiser's request, and the second jury reaffirmed the damages by awarding

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¶ *Third*, as a matter of judicial administration, failure to award interest for the period between judgments would unduly encourage post-trial motions and appeals rather than the prompt and efficient resolution of disputes.

4. The Third Circuit Failed To Apply The Proper Standard For Determining When Interest Begins To Run And Erred By Denying Plaintiffs 2-1/2 Years Of Interest

Finally, we point out below, how and why, in our respectful submission, the Court below erred in its denial of 2-1/2 years of interest:

First, it failed to address the purposes behind interest awards and failed to follow the majority rule,[38] including a recent case in its own court, *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 927 (3d Cir. 1985), which properly allows such interest.

Moreover, the stated basis for the denial of 2-1/2 years interest is entirely without substance and is partially based on an incorrect reading of dispositive precedent.

In *Institutionalized Juveniles*, the Third Circuit had remanded a fee award for recalculation, but held that interest on that award under 28 U.S.C. §1961 should be calculated on the amount of the award ultimately established on remand, with interest beginning to run *from the date of the original award* below, not from the date of the recalculation. *Id.* at 927. The panel opinion's stated reasons for distinguishing this case from *Institutionalized Juveniles*, based on whether a particular judgment was "modified," "vacated" or "vacated in part," place form over substance and ignore: (1) that the second jury emphatically reaffirmed the damage

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an even higher amount. As in *Handgards*, the higher amount *did not reflect any increase based on the time value of money between the two awards*, and accordingly interest over that period is appropriate.

[38] *See Chattem Inc. v. Bailey*, 108 S. Ct. 2831, 2832 (1988) (White, J., dissenting from denial of certiorari).

award first assessed in 1979 and (2) that the 1979 liability finding was *never* reversed and formed the basis for the damage award.[39]

As this Court stated in *Kneeland v. American Loan & Trust Co.*, 138 U.S. 509, 511-512 (1891), in affirming the award of interest from the date of an original decree, rather than the date of recalculation of the amount of the award:

> Equity regards the substance and not the form. The rights of the parties are not to be sacrificed to the mere letter, and whether the language used was reversed, modified, or affirmed in part and reversed in part, is immaterial. Equity looks beyond these words of description to see what was in fact ordered to be done.

The Third Circuit also erred in ignoring the dictates of equity, and the emphatic reaffirmance of the damage award upon its recalculation at Kaiser's request.

Finally, the court below erred in purporting to distinguish *Handgards* by incorrectly describing that case as "holding that plaintiff is entitled only to postjudgment interest from the date of the first judgment to the date of the second judgment

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[39] The court below suggested that the present case was different from *Institutionalized Juveniles* because that case involved the court's "modifying a judgment." 865 F.2d at 751 n.6, Pet. A-12 n.7. The court in *Institutionalized Juveniles*, however, *did not* simply "modify" the District Court judgment. The judgment was "vacated in part, and the case remanded for further proceedings." 758 F.2d at 927. The District Court was directed to recalculate the fee award and then grant "postjudgment interest * * * on the amount of the recalculated award *from the date of its original order* awarding the fee." *Institutionalized Juveniles*, 758 F.2d at 927 (emphasis added).

Similarly, in the present case, interest should run on the recalculated judgment amount from the date of the original judgment in favor of Plaintiffs. *Cf. Black Grievance Committee v. Philadelphia Elec. Co.*, 690 F. Supp. 1393, 1406 (E.D. Pa. 1988) ("Defendant argues that the present case differs from *Institutionalized Juveniles* because the District Court fee award was vacated only in part in that case, while it was vacated in its entirety in the case at hand. *Defendants' argument is specious.*")(emphasis added).

because the claim was not liquidated until the first judgment." 865 F.2d at 571 n.6, Pet. A-12 n.6.[40] The Ninth Circuit in *Handgards* specifically held that the plaintiff *was entitled* to postjudgment interest over the period between the first and second judgments, just as Plaintiffs in the present case are requesting interest between the first and second judgments in their favor. *Id.* at 1299-1300 & n.28.[41]

The Court of Appeals' decision, in denying almost 2-1/2 years interest, by failing to award interest back to August 22, 1979, is at odds with the foregoing precedent and conflicts with the basic policy behind the federal interest statute and the federal antitrust laws. Plaintiffs, whose damages were measured as of May 31, 1977,[42] are entitled to interest from August 22, 1979 when they established Kaiser's liability for destroying their business and first obtained a multimillion dollar judgment in their favor.

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[40] The Third Circuit was incorrect to the extent it suggested the court in *Handgards* limited the plaintiff in that case to interest over the period between the two judgments. There was no dispute that plaintiff *was entitled* to interest after the second judgment. *See Handgards*, 743 F.2d at 1298.

[41] See discussion in II B that follows where we review the cases that have dealt with the *amount of principal* on which interest runs, where there has been a *re*-calculation of the award.

[42] In the present case, like *Handgards*, the increased amount of the judgment on retrial was not the result of any accounting for the time value of money between the dates of the two judgments. In both the 1979 trial and the 1981 damage trial, Plaintiffs' theory of damages remained the same: the damages were valued as of May 31, 1977. *Compare* J.A. 149, 157-167 (1981 damage trial), *with* J.A. 90, 126 (1979 damage trial). *See also* J.A. 129 (1981 Pretrial Statement on Damages).

B. *THE PRINCIPAL AMOUNT ON WHICH INTEREST RUNS:* Where Two Or More Successive Damage Awards Are Based On The Same Liability Finding, The Majority And Better Rule Is That Interest Runs On The Amount Of The Award Finally Determined To Be Correct, And As Of The Date Liability Was Established

Award is Decreased: Where there has been a *re*-calculation of a damage award, based on a single finding of liability, and the award is subsequently *reduced*, all courts agree, and we submit rightly, that interest runs from the original finding of liability, but *only* on the reduced award as ultimately determined to be correct as of the date of liability. *See, e.g., De La Rama*, 241 U.S. at 159-160 quoted at pp. 20-21 n.30. *See also* p. 21 n.31.

Award Is Increased: Similarly, where the award is subsequently *increased*, the courts are in agreement that interest on some amount of principal runs from the date liability first attached. Three circuits, however, apply only a *step-up* (i.e., principal on which interest runs stepped up to the higher amount only as of the date of the increase). *Bailey v. Chattem, Inc.*, 838 F.2d 149, 154 (6th Cir. 1988), *cert. denied*, 108 S. Ct. 2831 (1988); *Handgards, Inc. v. Ethicon, Inc.*, 552 F. Supp. 820, 821-22 (N.D. Cal. 1982), *aff'd*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443 (2d Cir.), *cert. denied*, 348 U.S. 856 (1954).

On the other hand, the majority, and we submit better rule, holds that interest on the increased amount goes back to the date liability was originally fixed. *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-738 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988); *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 927 (3d Cir. 1985); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc); *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971); *The Kia Ora*, 252 Fed. 507 (4th Cir. 1918); *Black Grievance Committee v. Philadelphia Elec. Co.*, 690 F. Supp. 1393, 1405-06 (E.D. Pa.

1988); *Mascuilli v. United States*, 383 F. Supp. 50 (E.D. Pa. 1974), *aff'd without opinion*, 519 F.2d 1398 (3d Cir. 1975); *cf. Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988).

Logic, fairness and the rule we urge this court to establish supports the latter rule.[43] The latter rule is proper because it is the event of establishing liability, not the quantification of damages, that establishes the existence of a debt owed by a defendant to a plaintiff. The date of quantification of damages is only relevant if delay damages or prejudgment interest is computed into the judgment as of that date. And that is precisely why the second sentence of Fed. R. App P. 37 gives broad authority to the Courts of Appeals to give appropriate "instructions" regarding the allowance of interest when it reinstates an earlier judgment.[44]

Thus, regardless which formulation this Court ultimately adopts, the court below erred in denying Plaintiffs *all* interest during the 2-1/2 years of delay. For the reasons advanced above, we urge this Court to hold that interest runs over the entire period from when liability attaches, and on the amount of the award finally recalculated to be correct as of that date.

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[43] *Cf.* Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1042 n.118 (1955) ("Of course, an appellate court when increasing a lower court's award may order that interest run on the total amount of the final judgment from the date of the first judgment. In doing so * * * the appellate court is awarding interest in the exercise of its discretionary power to award proper relief, not deciding what §1961 allows."). (citations omitted).

[44] See discussion below pp. 40-41.

C. *POWER TO AWARD*: The Courts Of Appeals Have The Power (Inherent, Equitable And Under Fed. R. App. P. 37) To Award Interest At Commercial Free Market Rates Where Minimum Interest Mandated Under 28 U.S.C. §1961 Is Inadequate To Preserve The Value Of The Judgment

1. *INTRODUCTION*: Federal Court Power To Award Adequate Interest

Given the history and purposes of interest on court judgments discussed above,[45] any diminution in the value of the judgment due to failure to adequately account for the time value of money would be contrary to the policy behind interest awards and the federal antitrust laws.

As stressed in this brief,[46] T-bill rates, as provided for under 28 U.S.C. §1961, in routine interest calculations by District Court clerks on judgments in their courts, are significantly below commercial market rates (prime, compounded monthly): Thus, in the present case, if interest was properly calculated from the 1979 finding of liability, the shortfall between interest at market rates ($18.6 million) and interest at the fixed T-bill rate ($11.9 million) over the same period amounts to a windfall to Kaiser and a corresponding shortfall to Plaintiffs of some $6.6 million (35.8% of the market rate interest), and a diminution of 23% of its total award of principal and interest.

It is in this setting that this Court must interpret the inherent and equitable power of the Courts of Appeals to award adequate interest, as well as Fed. R. App. P. 37, and 28 U.S.C. §1961.

As noted below (pp. 32-40), the inherent and equitable power of the courts to resolve cases, grant the courts power, in a case such as this, plagued as it has been by extraordinary

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[45] See Section I above, pp. 13-17, discussing the history and fourfold purposes of interest.

[46] *See* Statement of Case, B-4, pp. 7-8, and discussion below pp. 41-46.

delays, to award interest at market rates from the original judgment on August 22, 1979. The court below erred in failing to recognize and act upon this inherent and equitable power. *See* pp. 41-46.

Moreover, Fed. R. App. P. 37 reaffirms the power of federal appellate courts to award adequate market interest as part of their mandate, in cases such as this one, where the December 27, 1984 judgment in Plaintiffs' favor, affirmed the August 1979 liability finding and modified upwards the January 17, 1983 final judgment of the District Court. *See* pp. 40-41.

Where the minimum amount of interest mandated under 28 U.S.C. §1961[47] is not adequate to preserve the value of the judgment, the courts have the power, authority and duty to award adequate interest. That authority and duty are particularly acute in cases such as this one where the delay in collection was due solely to stays of execution obtained by the defendants, and the ultimately unsuccessful post-trial proceedings, initiated by the defendants to challenge the jury's verdicts and judgments of the court.

2. *INHERENT POWER, ITS ROOTS*: Federal Courts Have Inherent Power To Award Adequate Interest To Preserve The Value Of Judgments In Their Courts

Federal courts have inherent power and authority[48] over matters essential to the administration of justice and essential

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[47] The Act of 1842, 28 U.S.C. §1961, merely mandates the minimum "floor" amount of interest that must be awarded as a matter of course on all judgments entered in federal District Courts, and which may be calculated by the clerk and included in the amount collected on the judgment through a writ of execution levied by the federal marshal. *See* pp. 34-35.

[48] It is beyond question that the federal courts have inherent powers vested in them upon their creation. *See United States v. Hudson*, 7 Cranch (11 U.S.) 32, 34 (1812); *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 227 (1821); *Ex parte Robinson*, 19 Wall. (86 U.S.) 505, 510 (1873); *Michaelson v. United States*, 266 U.S. 42, 66 (1924); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962).

for the functioning of the judiciary, *Levine v. United States*, 362 U.S. 610, 615-616 (1959); *see also Michaelson v. United States*, 266 U.S. 42, 65-66 (1924); *Myers v. United States*, 264 U.S. 95, 103 (1924), as well as "inherent power" to enforce their orders and judgments and preserve and ensure the full efficacy of the relief they order.[49]

As a basic matter of judicial administration essential to the proper functioning of the judiciary, federal courts have the power to stay execution of their judgments pending post-trial motions and appeals and award interest to the judgment creditor over the period the stay is in effect.[50] The power to stay proceedings pending appeal is "inherent" and cannot be limited even by a statute providing that an appeal shall not act as a stay.[51] *In re McKenzie*, 180 U.S. 536, 550-51 (1901); *see also Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942); *In re Claasen*, 140 U.S. 200, 205 (1891).

The inherent power to compensate a judgment creditor for delay in execution on a judgment[52] is just as much a part of the court's "traditional equipment for the administration of justice" (*Scripps-Howard*, 316 U.S. at 9-10), as the power to

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[49] *See, e.g., Ex parte Peterson*, 253 U.S. 300 (1920); *see also* Fed. R. Civ. P. 69 & p. 34 & n.53 below.

[50] *See* 28 U.S.C. §2101(f); S. Ct. R. 44; Fed. R. App. P. 8, 41; Fed R. Civ. P. 62.

[51] The power of the Congress to regulate matters within the inherent power of the courts is limited by constitutional principles of separation of powers and by the constitutional grant of jurisdiction to the federal courts in Article III. *See generally United States v. Klein*, 13 Wall. (80 U.S.) 128, 147 (1871); Levin & Amsterdam, *Legislative Control Over Judicial Rule Making: A Problem Of Constitutional Revision*, 107 U. Pa. L. Rev. 1, 30 (1958); Frankfurter & Landis, *Power of Congress Over Procedure In Criminal Contempts in "Inferior" Federal Courts – A Study In Separation of Powers*, 37 Harv. L. Rev. 1010, 1017-22, 1049 (1923); 2 G. Haskins & H. Johnston, *History of the Supreme Court of the United States* 612-13 (1981).

[52] *See* Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1042 n.118 (1955) (appellate court "discretionary power to award proper relief"); *cf. Laudenberger v. Port Auth.*, 496 Pa. 52, 60-67, 436 A.2d 147 (1981) (court power over delay damages), *appeal dismissed*, 456 U.S. 940 (1982), *superseded by amended Rule 238*.

stay execution. Both are intended to prevent "irreparable injury to the parties" (*id.* at 9) – such as, in the present case, erosion of the value of the judgment during the appeals process.

Thus, ever since the Judiciary Act of 1789, which first created the lower federal courts, the federal appellate courts have had the power to award interest. Judiciary Act of 1789 sec. 23, 1 Stat. 85 (currently codified as amended at 28 U.S.C. §1912).

(a) Courts' Power To Award Interest Is Not Dependent Upon Authority From The Congress

The foregoing power under the Judiciary Act, and other inherent power, was vested in the courts upon their creation. It predates by some 50 years the federal statute for execution on federal District Court judgments with interest, enacted in 1842, currently codified, as amended, at 28 U.S.C. §1961.

The Act of 1842 was enacted to put federal courts on a par with state courts which generally allowed levy of execution for the judgment amount plus interest by statute and to avoid the cumbersome procedure of instituting a separate action in debt to recover full interest.[53] The Act specifically

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[53] As this Court noted in *Perkins v. Fourniquet*, 14 How. (55 U.S.) 328 (1852), "[u]pon common-law principles a judgment does not carry interest" but "damages may be recovered for the detention of the debt, in an action on the judgment." 14 How. (55 U.S.) at 331. *See also* Note, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019, 1019 n.4 (1955).

The abolishment of common law pleading rules, upon the adoption of the Fed. R. Civ. P. in 1938, effectively abolished any requirement that a judgment creditor institute a separate action in debt to recover interest or damages for the detention of the judgment amount. Indeed, Fed. R. Civ. P. 69 specifically set forth the power of federal courts to render effective relief "in proceedings supplementary to and in aid of a judgment" in accordance with the practice and procedure available under state law.

In order to afford complete and effective relief, a modern federal court of equity, operating under the Fed. R. Civ. P. and Fed. R. App. P. 37, has the power to, and should, award interest that could be recovered in any separate common law action in debt for detention of the judgment.

provided that District Court judgments would carry interest "by force of law" notwithstanding the failure of the court to order payment of interest on the judgment. *See Perkins v. Fourniquet*, 14 How. (55 U.S.) 328, 331 (1852). Even prior to its enactment, this Court upheld the power of the federal marshal to levy execution on the amount of federal court judgments, plus interest under state law. *Amis v. Smith*, 16 Pet. (41 U.S.) 303, 311 (1842).

Subsequent decisions of this Court clearly establish the power of the federal courts to award interest independent of any statutory authority granted by Congress. *See, e.g., West Virginia v. United States*, 479 U.S. 305, 308-09 (1987); *Billings v. United States*, 232 U.S. 261, 285-87 (1914); *National Bank of Commonwealth v. Mechanics' National Bank*, 94 U.S. 437 (1876).[54]

(b) The Statute for Interest In Execution On District Court Judgments (28 U.S.C. §1961) Does Not And Cannot Preempt This Court Or The Courts Of Appeals From Awarding Appropriate Interest To Preserve The Value Of Judgments

The Act of 1842 was specifically addressed to interest on judgments of federal District Courts and federal circuit courts. Shortly after its enactment, this Court specifically held that it does not govern judgments of the Supreme Court. *Mitchell v. Harmony*, 13 How. (54 U.S.) 115, 147-49 (1851); *Perkins v. Fourniquet*, 14 How. (55 U.S.) 328, 330-33 (1852).

Similarly, the Act of 1842, as amended and currently codified at 28 U.S.C. §1961, also does not apply to judgments

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[54] Some decisions of this Court have gone so far as to indicate that when a federally protected right – such as the freedom from monopolistic trade practices – is invaded, "federal courts may use any available remedy to make good the wrong done." *Cf. Bell v. Hood*, 327 U.S. 678, 684 (1946). *See also Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15-16 (1971).

of the federal Courts of Appeals.[55] The several Court of Appeals have power and discretion to award interest at market rates where appropriate to preserve the value of the judgment.[56] *See* 28 U.S.C. §1912; Fed. R. App. P. 37;[57] *cf. Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948) (ultimate power of Court of Appeals to provide in its mandate for appropriate interest); *Perkins v. Fourniquet*, 14 How. (55 U.S.) at 331-33 (power of the Supreme Court to award interest on its judgments independent of the authority of the Act of 1842, currently codified as 28 U.S.C. §1961).

3. *EQUITABLE POWER*: Federal Courts Have Equitable Power To Award Sufficient Interest To Preserve The Value Of The Judgment

(a) This Court's Precedent Dictates That Courts Should Award Interest As Warranted By Principles Of Equity And Justice

More than 100 years ago, this Court invoked equitable principles to justify an award of interest, notwithstanding the lack of any statutory authority for such an interest award. *Young v. Godbe*, 15 Wall. (82 U.S.) 562, 565-66 (1872). Four years later, in *National Bank of Commonwealth v. Mechanics'*

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[55] Subsection (c) enumerates certain courts' judgments that are covered by 28 U.S.C. §1961 in addition to the "District Court" listed in subsection (a). Subsection (c)(4) specifically declares, consistent with this Court's hundred-year-old interpretation of the statute, that: "This section shall not be construed to affect the interest on any judgment of any court not specified in this section."

Thus 28 U.S.C. §1961 does not limit the power of the Court of Appeals to grant adequate interest on its December 27, 1984 judgment.

[56] Indeed, Mr. Justice Harlan (the elder), albeit in dissent, once stated his view that legislative attempts to deprive litigants of interest could constitute a deprivation of property without due process of law. *Morley v. Lake Shore & M.S. Ry*, 146 U.S. 162, 177-178 (1892) (Harlan, J., dissenting).

[57] *See* below pp. 40-41.

National Bank, 94 U.S. 437, 439 (1876), this Court held that claims proved before the Comptroller of the Currency bore interest even though they had not been perfected as judgments of a court because they "are within the equity, if not the letter, of these statutes [providing for interest on judgments], and bear interest as judgments would have done."

As discussed above (pp. 14–15), this Court has repeatedly held that interest should be awarded whenever the principles of equity and justice dictate such an award. *See, e.g., Billings v. United States*, 232 U.S. 261, 285-288 (1914).

(b) The Courts Of Appeals' Equitable Power To Award Interest On Judgments Does Not Conflict With Any Act Of Congress

Although courts of equity justifiably are reluctant to act in a manner explicitly contrary to an act of Congress, the award of interest on judgments, to preserve the value of a treble damage award mandated by an Act of Congress[58]

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[58] As discussed below (pp. 41-46), full commercial rate interest is necessary to preserve the value of the trebled award mandated as an ample remedy and to carry out federal policy. The Clayton Act, under which this action was brought, expressly grants broad equity powers to the courts to protect private parties such as Plaintiffs. 15 U.S.C. §26.

Given the equity power expressly conferred by Congress, the Courts should not be reluctant to invoke equity to award adequate interest to preserve the full award mandated under the Act. *Cf. Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946) (Emer. Price Control Act) ("the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command").

As this Court stated in *Porter*, "[r]estitution, which lies with that equitable jurisdiction * * * is within the recognized power and within the highest tradition of a court of equity." *Id.* at 402.

This Court has stressed that a federal court has the inherent power to fashion a remedy as the equities of a case require, even absent statutory authority for a given remedy. *See, e.g., Sprague v. Ticonic Bank*, 307 U.S.

(Continued on following page)

against diminution caused by delays in the judicial process, is a matter within the inherent power of the courts.

In the present case, there is no conflict between an act of Congress and the inherent power of the courts because 28 U.S.C. §1961 does not by its terms limit the courts' authority. Rather, it merely sets a minimum amount of interest that must be awarded on any District Court judgment and provides for levy of execution on the judgment amount, plus interest, without the necessity of any further court order awarding interest. It also serves as a "rule of convenience" for quick and easy calculations by the clerk's office, or agents of the parties.[59] It does not preclude a court of equity from awarding adequate interest to preserve the value of a judgment.

Although Courts of Appeals have generally been guided by the interest provisions of 28 U.S.C. §1961 in determining the time period and the rate of interest, they, quite properly, have not felt constrained to limit interest awards to the minimum amount mandated by that statute. Instead, they have generally employed equitable principles in any given case to preserve the value of the judgment against erosion over time. *See, e.g., Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270

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161, 164-67 (1939) (District Court may tax as costs, attorneys' fees to the prevailing party, even though statute authorizing the underlying action does not permit it); *Texas & N.O. R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 569-70 (1930) (absence of statutory penalty does not prevent District Court from enjoining statutorily prohibited activity).

[59] The fixed T-bill rate provided in 28 U.S.C. §1961 as amended establishes a rule of convenience allowing attorneys and the courts to easily calculate the interest due on the thousands of judgments entered daily in the District Court.

As discussed below (p. 44 & n.71), the advent of the "computer revolution" has made calculation of interest, at more accurate fluctuating rates, just as easy as calculation at a *fixed rate*. Similarly, it is just as easy to calculate interest compounded monthly or daily as it is to calculate interest *compounded annually*. *See* Bowles & Wheland, *The Law of Interest; Dawn of a New Era?*, 64 Can. Bar Rev. 142 (1986).

(3d Cir. 1987); *Louisiana & Ark. Ry. Co. v. Pratt*, 142 F.2d 847 (5th Cir. 1944).

In addition to cases equitably extending the scope of coverage of §1961 (*National Bank*) and cases equitably extending the time period over which interest runs (*Poleto; Pratt*), the lower courts have also exercised equitable discretion in setting the *rate of interest*, notwithstanding the rate specified in 28 U.S.C. §1961.[60]

Moreover, the lower courts have recognized the courts' discretion to set an adequate postjudgment interest rate, where the court's equitable power, rather than 28 U.S.C. §1961, forms the basis for the award of postjudgment interest. *Brock v. Richardson*, 812 F.2d 121, 126 (3d Cir. 1987).[61]

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[60] For example, in *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 738 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988), the Court of Appeals affirmed the District Court's exercise of discretion in setting reasonable rates for postjudgment interest following entry of the original judgment and remand on appeal, stating:

> It is apparent that commercial rates increased greatly during this period and the trial court had discretion to keep the rates *in accordance with the real world.* (emphasis supplied).

Cf. Devex Corp. v. General Motors Corp., 749 F.2d 1020, 1024 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985) (applying higher rate in amended Delaware law, notwithstanding contrary declaration by Delaware legislature, in order to advance "the policy underlying 28 U.S.C. §1961: compensation of the wronged party for loss of the use of money, in a changing economy . . . [reflecting] changes in the value of the use of money"); *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981) (prejudgment interest at market rates); *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 842 F.2d 1466, 1479-80 (3d Cir.) (prejudgment interest), *cert. denied*, 109 S. Ct. 273 (1988).

[61] The Act of 1842 was originally interpreted to apply only to judgments at law, and not to decrees in equity. *Perkins v. Fourniquet*, 14 How. (55 U.S.) at 331. Although that distinction is of questionable significance after the merger of law and equity, several courts of appeals have reaffirmed the power of the federal courts to grant both prejudgment

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This Court has repeatedly recognized the equitable power of the federal courts to award interest where appropriate. The equities of this case warrant an award of interest from August 22, 1979 at commercial market rates of interest.

4. *POWER UNDER FRAP 37*: Fed. R. App. P. 37 Reaffirms The Power Of Federal Courts Of Appeals To Award Interest Adequate To Preserve The Value Of The Judgment

Finally, the Court of Appeals' inherent and equitable power to award interest to preserve the value of a judgment on remand is a matter within its power to issue its mandate;[62] – and is codified and embraced in Fed. R. App. P. 37.[63]

(Continued from previous page)

and postjudgment interest on equitable awards based on the equity power of the court. *Brock v. Richardson*, 812 F.2d 121, 125-127 (3d Cir. 1987); *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55, 58 (2d Cir. 1984). In such instances the Third Circuit has suggested that the court has discretion to set the rate of both prejudgment interest and postjudgment interest, notwithstanding the rates of interest specified in 28 U.S.C. §1961 for postjudgment interest. *Brock v. Richardson*, 812 F.2d at 127.

This inherent equitable power of the courts to award adequate interest should apply both to actions at law and actions in equity following the merger of law and equity upon the adoption of the Fed. R. Civ. P. in 1938, just as 28 U.S.C. §1961 should properly now be interpreted to apply to both legal and equitable relief ordered by District Courts. *Cf. Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986).

[62] *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948); *cf. Perkins v. Fourniquet*, 14 How. (55 U.S.) 328, 331-33 (1852) (Supreme Court authority to award interest irrespective of §1961's predecessor).

[63] Prior to the adoption of the Fed. R. App. P. in 1968, all of the federal circuits had their own rules providing for interest, similar to this Court's current Rule 49. *See* Note, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019, 1024 n.21 (1955).

Fed. R. App. P. 37 (which was enacted pursuant to the Rules Enabling Act, 28 U.S.C. §§2071-2077) reaffirms the power of the Courts

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At least one federal Court of Appeals has modified its prior strict and narrow interpretation of §1961, holding that in light of Fed. R. App. P. 37, it has discretion to order interest running from the original judgment or verdict in favor of the judgment creditor. *Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988).[64] The Second Circuit in *Smith* recognized that Fed. R. App. P. 37, (adopted as it was under the Rules Enabling Act[65]) superseded that court's prior interpretation of 28 U.S.C. §1961.

In sum, interest awarded on a judgment of a Court of Appeals whether pursuant to its inherent or equitable power, or under Fed. R. App. P. 37, is not subject to any arbitrary limits affecting *time period, rate of interest* or the *principal amount*, where awards have been recalculated after liability has been fixed. Interest should be adequate to preserve the value of the award below based on the economic reality of the cost of money to the litigants in the private marketplace.

D. *COMMERCIAL MARKET RATES*: The Value Of The Judgment In The Present Case Will Be Severely Diminished If Prime Rates Are Not Awarded

Kaiser does not dispute, nor could it, that the time value of money, *including its cost of money*, is set in the private marketplace; and that its cost of money throughout the relevant period was at prime or above. It is there that the courts

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of Appeals to issue with their mandates "instructions with respect to allowance of interest" in cases such as the present one in which the District Court's January 18, 1983 final judgment was "modified or reversed with a direction that a judgment for money be entered in the District Court." Fed. R. App. P. 37.

[64] *See also* cases cited in note 31 on p. 21.

[65] The Rules Enabling Act provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. §2072(b); *Smith*, 856 F.2d at 473.

should look to determine the appropriate rate of interest to vindicate the purposes of interest and preserve the value of a judgment.

Kaiser's Benefit And Plaintiffs' Loss From Delay

As noted in the Statement of the Case (see pp. 2-11), the critically relevant time periods from May 1977 to August 1979 and from August 1979 to December 1981 were marked by unusually high inflation and volatile interest rates.[66] Attempting to slow the economy and ease inflation, the Federal Reserve Bank at times drove the prime lending rate up above the 20% level. J.A. 303-308. Meanwhile, Kaiser continued to enjoy the benefits of its illegal monopoly and, has continued to delay for 10 years, through post-trial motions, appeals and petitions for certiorari, its final day of reckoning.

While the *prime rate* (data that is regularly reported by the Federal Reserve Bank[67]) accurately measures the time value of money to commercial businesses in the private market,[68] rates provided (for routine District Court judgments) by 28 U.S.C. §1961, as amended, *systematically undervalue* the market cost of money to business litigants in at least three major respects:

First, (2 to 3 points below prime): Federal Treasury bill rates, based as they are on short term borrowing of the United States government (which, as the most creditworthy of all

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[66] *Cf.* S. Homer, *A History of Interest Rates* at 3 ("The spectacular rise in interest rates during the 1970's carried many long-term market rates on prime credits up to levels never before reached or approached in our time.").

[67] The Federal Reserve Bank issues weekly Statistical Releases that include the monthly average prime and weekly average prime for the preceding month and week.

[68] *See* 1987 Annual Statistical Digest of the Board of Governors of the Federal Reserve System, at 56, 242.

debtors, commands a lower borrowing rate[69]), systematically undervalue the cost of money to private litigants by 2 to 3 points.[70]

Second, (interest compounded only yearly): The federal interest statute as amended in 1982, 28 U.S.C. §1961(b),

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[69] *See* Reitz, J.A. 231; *see also* 28 U.S.C. §6621 (taxpayers pay IRS Federal short-term rate plus 3 percentage points with substantial underpayments at 120% of that rate); *Union Pacific RR. Co. v. United States*, 11 Ct. Cl. 177 (1986) (discussing legislative history of the increase of interest rates on tax obligations noting that "[h]istorically the 6 percent interest rate was meant to be higher than the prevailing money market rate to encourage [prompt payment]").

[70] The original proposal for amendment of 28 U.S.C. §1961 provided for interest at prime rate on *all cases*. The Senate report to this bill recognized that a substantial increase in rates was needed to eliminate the incentive for delay in the Courts. *See* S. Rep. No. 97-275, 97th Cong. 2d Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21:

> Under current law, the interest rate on judgments in the Federal courts is based on varying State laws and frequently falls below the contemporary cost of money. Part B of Title III sets a realistic and nationally uniform rate of interest on judgments in the Federal courts that would be keyed to the *prime interest rate* as determined by the Internal Revenue Service. *This eliminates an economic incentive which exists today for a losing defendant to appeal a judgment and accumulate interest on the judgment award at the commercial rate during the pendency of the appeal.* (emphasis added).

The *market rate* provision was changed, at the last moment, to the federal T-bill rate, at the request of then Budget Director David Stockman, who on behalf of the United States urged that the postjudgment interest rate not exceed the cost of money of the federal government. *See* 127 Cong. Rec. 29, 866 (1981); *see also Campbell v. United States*, 809 F.2d 563, 574-75 (9th Cir. 1987). Prior to amendment, the federal government paid only 4% interest on judgments. *Id.* at 567.

One Court of Appeals has actually ordered both pre- and postjudgment interest at "IRS prime rates," apparently confused or failing to recognize the last minute change in the statutory language quoted in its own opinion. *EEOC v. Guardian Poos, Inc.*, 828 F.2d 1507, 1512 & n.4 (11th Cir. 1987).

provides interest compounded only annually, whereas "interest on private loans is compounded at least on a monthly, and often on a daily basis." Reitz, J.A. 231; *cf.* 26 U.S.C. §6622 (daily compounding of interest on judgments in favor of the IRS); Note, *Interest on Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1048 n.150 (1955); *see also* p. 7 n.11 above.

Third, (fixed not fluctuating rate): Finally, 28 U.S.C. §1961, as a rule of convenience, fixes a *single interest rate* on any given judgment based on the T-bill rate as of the date interest begins to run. This is in stark contrast to the free marketplace, which measures interest at floating rates.[71] Thus an award of interest at a fixed T-bill rate under 28 U.S.C. §1961, in an inflationary period such as the last twenty years, will undervalue the cost of money in the marketplace, unless a volatilely high fixed rate attaches on the date interest begins to run.[72]

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[71] Although short term loans are made at either fixed or floating rates, longer term loans tend to be made at floating rates based on prime in the private marketplace. *See* 1987 Annual Statistical Digest of the Board of Governors of the Federal Reserve Bank at 57 ($5.4 billion out of $7.1 billion of long term loans at floating rates).

[72] A perfect example of the arbitrary inequity of applying a fixed volatile T-bill rate is demonstrated by this case.

After the Court of Appeals directed that interest would only run from the date that the award was re-calculated, it became apparent that there was an incredible swing in the Treasury Bill rate, depending on whether the relevant auction setting the fixed rate of interest, was:

1. *The auction "settled" on November 5, 1981:* i.e., interest at 14.84% developing some $12 million of interest as of January 1988; or

2. *The auction "settled" on December 3, 1981:* i.e., interest at 11.58% developing only some $8 million of interest as of January, 1988.

Over the year from April 1981 to April 1982, the auction that settled on December 3, 1981 *was the only auction with a yield lower than 14%!*

On Plaintiffs' application for instructions in the mandate that the auction settled on November 5, 1981 provided the governing T-bill rate

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Although the systematic undervaluing of interest because of the three factors discussed above may be *de minimus*, as it relates to the routine short period of delay between entry of final judgments in the District Court, after exhaustion of all appeals until execution on the judgment,[73] the impact on the parties to the present case is so substantial that it cannot be ignored by a court of equity. The periods of delay were so long, and the deficiency in the amount of the interest award so great, that the Court of Appeals should have exercised its power to award market rate interest to preserve the value of the judgment.

Kaiser did not pay Plaintiffs any money until July 3, 1986, when it paid $9,567,939. Calculating interest on the $9,567,939 judgment amount from the date of the original August 1979 judgment (at monthly average prime rates, compounded monthly, accounting for a payment of $9,567,939 against principal on July 3, 1986), interest due amounts to $18,634,754. Adding this $18.6 million of interest to the approximately $9.5 million judgment amount, the total value of the judgment is in the range of $28 million.

Yet, Kaiser in an act of incredible greed seeks to limit its interest liability to two days of interest for a total of $1,223 (R. 537a). By such legerdemain it effectively detrebles a treble-damage judgment: from a value of $28 million to approximately $9.5 million. Such result is offensive to any sense of fairness or public policy; including national antitrust

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(14.84%), the Court of Appeals determined that the District Court should resolve this issue in the first instance. Pet. A-74.

Given the ease of measuring the true cost of money, no court of equity should feel bound by an arbitrary "rule of convenience" for routine judgments in district courts where $4 million of interest, turns upon a technical interpretation of a statute that has no bearing whatsoever on the actual diminution in the value of the judgment occasioned by court delays.

[73] Or similarly to a run-of-the-mill appeal that takes no longer than a year to resolve.

enforcement policy[74] and a wise judicial policy that seeks to eliminate any economic incentive to use the courts for delay. *See* pp. 15-17 below.

Furthermore, even though Kaiser knew, as of August 1979, that it was liable for treble damages for destruction of Plaintiffs' business, it never availed itself of its option under Fed. R. Civ. P. 67 to stop the running of interest.[75] Instead, it took every available opportunity to file extensive post-trial motions and appeals, repeatedly relitigating, – and losing – all of the many complex issues that are invariably presented in private antitrust litigation. Enough is enough:

- Kaiser – as a predatory monopolist – should not be permitted to benefit from its delay.
- Plaintiffs – the victims of Kaiser's predatory conduct – should not bear the cost of delay.
- Kaiser, after more than 15 years of litigation, should not be permitted to pay off a judgment measured in 1977 dollars in devalued funds.
- Kaiser, over the long course of this litigation, has continued to enjoy the monopoly, which it illegally protected, by driving Plaintiffs out of business, and it will continue for many years to enjoy such benefits in the future.
- Plaintiffs, on the other hand, lost their family-owned business and, in the prime years of their lives, which should have been spent in productive and rewarding enterprise, were forced to endure more than 15 years of bitter litigation, against a large and powerful monopolist, who brought unlimited resources to bear in contesting and relitigating each and every conceivable issue.
- Kaiser was entitled to its day – or rather its decade and a half – in court, and lost. Now it should pay the full measure of what has been determined Plaintiffs should receive.

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[74] See discussion above at pp. 16, 37 & n.58.

[75] See p. 20 & n.28 above.

CONCLUSION

For the reasons stated above, this Court should reaffirm the inherent and equitable power of the Court of Appeals and the power pursuant to Fed. R. App. P. 37 to award adequate interest to preserve the value of the judgment and should remand to the Court of Appeals with instructions to award interest on $9,567,939 at monthly average prime rates (as reported by the Federal Reserve Bank), compounded monthly, from August 22, 1979 to the date of full payment of all principal and interest.

Respectfully submitted,

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APPENDIX

OF

RULES AND STATUTES

1. Fed. R. App. P. 37 provides:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the District Court. If the judgment is modified, or reversed with a direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to allowance of interest.

2. 28 U.S.C. §1961, as amended effective October 1, 1982, provides:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a District Court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such Court is held, execution may be levied for interest on judgments recovered in the Courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1)This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

No. 88-1771

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOSEPH A. BONDORNO, LORRAINE KERR (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), and BARBARA K. CLISBY,

Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR CROSS-RESPONDENTS

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Counter-Statement Of The Questions Presented

1. Whether this Court should reconsider and overturn the well-established principle originally settled in *Pierce v. United States,* 255 U.S. 398, 406 (1921), that interest on judgments "rests solely upon statutory provision," and instead fashion a discretionary standard that permits postjudgment interest pursuant to undefined "equitable" principles at rates and over time periods exceeding those prescribed by Congress in the federal postjudgment interest statute, 28 U.S.C. § 1961?

2. Whether this Court would do "equity" by awarding plaintiffs postjudgment interest, exceeding the amount permitted by Congress in 28 U.S.C. § 1961, where the delay in recovery of the judgment was not the result of dilatory conduct on Kaiser's part or frivolous appeals by Kaiser, but rather reflected the uncertainty of Kaiser's liability and plaintiffs' own failure of proof as shown by:

(i) the district court's original directed verdict in Kaiser's favor on liability;

(ii) plaintiffs' initial failure of proof of damages, which led to a two-year delay and the necessity to retry the damage issues;

(iii) two Court of Appeals judges voting in favor of *in banc* reconsideration of the panel decision affirming the 1979 liability finding;

(iv) a dissent from denial of certiorari in this Court with respect to the underlying liability issues;

(v) the Solicitor General's characterization of the Court of Appeals' decision upholding the jury's liability finding as erroneous; and

(vi) the fact that all the appeals from the district court to the Court of Appeals were initiated by plaintiffs, not by Kaiser?

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OPINIONS BELOW

The Judgment of the Court of Appeals is set out in the Appendix to the Petition For A Writ Of Certiorari To The Court Of Appeals For The Third Circuit, (the "Petition") filed by Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser") No. 88-1595, at P.A.1.[1] The Opinion of the Court of Appeals, dated January 9, 1989, is reported at 865 F.2d 566 (3d Cir. 1989), and is set out at P.A.3. The Order of the Court of Appeals denying rehearing and rehearing *in banc,* dated February 13, 1989, is set out at P.A.29. The Opinion of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), dated April 11, 1988, is set out at P.A.31.

JURISDICTION

The Judgment of the Court of Appeals awarding postjudgment interest was entered January 9, 1989. (P.A.1). Kaiser filed a timely petition for rehearing and suggestion of rehearing *in banc,* which was denied by Order dated February 13, 1989, with a notation that Circuit Judges Becker, Stapleton and Hutchinson would have granted the petition for rehearing *in banc.* (P.A.29-30). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Petition was timely filed by Kaiser under 28 U.S.C. §2101(c) and Rules 20.2 and 20.4 of this Court. This Court, by Order dated June 19, 1989, granted the Petition and the Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit, filed by Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George

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1. References to the Appendix to the Petition are cited herein as "P.A.____".

M. Kerr, Jr.) and Barbara K. Clisby,[2] No. 88-1771. (J.A.311).[3]

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. §1961 as it read prior to October 1, 1982 and amended 28 U.S.C. §1961, which was enacted on April 2, 1982 and became effective on October 1, 1982.

Prior to its amendment in 1982, 28 U.S.C. §1961 provided:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

As amended in 1982, Section 1961 now provides in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by

2. Kaiser will refer to cross-petitioners, Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.), and Barbara K. Clisby, who were the plaintiffs in the district court, as "plaintiffs" in order to avoid confusion.

3. References to the Joint Appendix are cited herein as "J.A.___".

> the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal Judges.

COUNTER-STATEMENT OF THE CASE

A chronological statement of the procedural history of this case, from the filing of plaintiffs' Complaint in 1974, until the grant of certiorari by this Court, is set forth in the Statement Of The Case contained in the Brief For Petitioners filed by Kaiser in the case consolidated with this one, No. 88-1595. However, certain features of that procedural history which bear upon this Court's resolution of the issues presented in Cross-Petitioner's Brief are distorted in plaintiffs' Statement Of The Case and require clarification.

A. Plaintiffs' Failure Adequately To Prove Damages Caused The Delay In Entry Of A Valid Judgment From August 1979 To December 4, 1981.

Plaintiffs wrongly attribute the delay in entry of a valid judgment from 1979 to 1981 to Kaiser's post-trial motions. (Brief, at 2, 4, 20, 27)[4]. Plaintiffs also repeatedly mischaracterize the December 4, 1981 judgment in the amount of $9,567,939 entered in the district court as a "modification," "alteration" and "recalculation" of the 1979 damage judgment. (Brief at 3, 4, 11, 12, 18, 22, 23, 24, 27).

The delay between the jury's liability verdict in 1979 and the entry of the judgment on December 4, 1981, resulted solely from the fact that the 1979 judgment was

4. Kaiser will refer to pages in the Brief For Cross-Petitioners On The Merits of Plaintiffs' Cross-Petition as "Brief, at ___".

invalid and was *vacated* by the district court. Plaintiffs were required to *retry* the entire issue of damages. There was never any "modification" or "recalculation" of damages by the court or the jury. The decision of the district court (set out at J.A.92-128), vacating the invalid 1979 judgment, was not even appealed.

The reason the district court vacated the 1979 judgment was that *plaintiffs' proof of damages* was inadequate. The district court found that "the evidence presented by [plaintiffs] as to the actual dollar amount of damages suffered was so deficient as to require a new trial on damages only." (J.A.112).

The district court said:

> The evidence presented by [plaintiffs'] two damage witnesses, Bonjorno and plaintiffs' expert witness on damages, Dr. Alfred Kuehn, was *incomplete, confusing and generally lacking in probative value.* The factual basis of the projections, predictions and calculations presented by them was never clear from the testimony. (J.A.112).[5]

Further, with respect to Bonjorno's damage testimony, the court found "the record insufficient in establishing the requisite factual basis for Bonjorno's estimates so that the jury could make a rational determination as to their accuracy." (J.A.113). With respect to plaintiffs' expert witness, Dr. Kuehn, the court determined "*that the illusion of complete accuracy created by graphs, charts, and garbled expert testimony created a speculative verdict in this case.*" (J.A.117). The court concluded that "the jury verdict could only be a product of confusion and speculation." (J.A.120). Finally, the court stated, "the deficiency in plaintiffs' proof of damages convinces the court that the verdict as to damages should not stand." (J.A.120). Kaiser cannot be blamed for the shortcomings of plaintiffs' conduct of the trial on

5. Emphasis supplied throughout unless otherwise indicated.

the damage issues.

Plaintiffs also incorrectly contend that their "theory of damages remained the same in the 1979 and 1981 damage trials." (Brief, at 28 n.42). In fact, although plaintiffs continued to seek damages for lost profits and loss of the value of the business as a going concern, the second damage trial bore little resemblance to the first. The first damage trial lasted two days. It consisted of the testimony of two witnesses for plaintiffs. Kaiser put on no evidence.

The second damage trial, before a different jury (a jury that never heard the liability evidence), consisted of fifteen live witnesses and ten witnesses by deposition. The trial lasted two weeks. At the second damage trial, plaintiffs employed two expert witnesses who had not testified in the first trial and who fashioned a wholly different approach to defining the elements of and calculating plaintiffs' damages. Plaintiffs' expert in the first trial posited five different alternative approaches to a damage calculation. In the second trial, plaintiffs' new expert had a single approach totally different from any of the five approaches advanced in the first trial. Unlike the first trial, Kaiser introduced evidence on damages in the second trial.

In short, the 1981 damage trial was a new and wholly separate trial of the damage issue. It did not involve simply a "recalculation," "modification" or "alteration."

B. Kaiser's Liability Involved Unsettled And Controversial Substantive Antitrust Issues Relating to Intra-enterprise Conspiracy And Liability For "Price Squeeze" And Was Not Clear Cut.

Plaintiffs suggest incorrectly that, as of August 1979, liability was a settled issue in this case. On the contrary, until this Court denied certiorari in 1986, plaintiffs' victory on liability was far from clear.

In 1977 and in 1979, plaintiffs tried their case on a Sherman Act §1 conspiracy theory and a Sherman Act §2 attempted monopolization theory. Their §1 case depended on a finding of intra-enterprise conspiracy between a corporation and its wholly-owned subsidiary. Both their §1 and §2 claims were based on a novel theory that Kaiser had subjected plaintiffs to a "price squeeze,"[6] notwithstanding that Kaiser did not supply the raw material to plaintiffs from which plaintiffs made the finished product during the period of the alleged "price squeeze." Therefore, plaintiffs' theory hinged on whether Kaiser could be held vicariously liable for "predatory" conduct because of the pricing practices of Kaiser's two larger competitors, Alcoa and Reynolds, who *did* supply plaintiffs during the period of the alleged "price squeeze." Plaintiffs were forced to argue that Kaiser was a "price leader" and that Alcoa and Reynolds "followed" Kaiser's price changes. Plaintiffs' antitrust claims also hinged on a controversial and vigorously contested finding that aluminum drainage pipe constituted a separate relevant product market from drainage pipe made of steel or concrete, with which aluminum competed head-on.

At the close of plaintiffs' case at the initial trial in 1977, the district court granted a directed verdict in Kaiser's favor on liability. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* No. 74-122, mem. op. (E.D. Pa. July 20, 1977). The court held that plaintiffs' evidence in their case-in-chief *affirmatively established* that steel and aluminum culvert pipe were not separate product markets, and that Kaiser's market

6. A price squeeze is an economic phenomenon that allegedly occurs when the margin between the price an independent producer has to pay for a raw material and the price the producer can charge for its end product is so small that the producer is unable to earn profits. There are many reasons why such a "price squeeze" may occur because of normal operation of market factors, independent of predatory motive.

share in the relevant market was insufficient to support plaintiffs' antitrust liability theories. *Id.* at 6, 14, 17. It found that, even assuming a parent and wholly-owned subsidiary could illegally conspire, there was insufficient evidence of conspiracy. *Id.* at 10. It found no evidence of an adverse effect on competition and evidence that Kaiser had a "limited position in the market for culvert drainage pipes . . ." *Id.* at 11. With respect to plaintiffs' §2 claims, the court found evidence that Kaiser lacked monopoly power and that Kaiser had "less than a three percent market position in the market made up of aluminum, steel and concrete culvert pipe and a slightly higher percentage of a market consisting only of aluminum and steel pipe." *Id.* at 19.

Plaintiffs appealed the directed verdict and the Court of Appeals reversed, based primarily on its differing assessment of plaintiffs' evidence concerning the product market. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* 579 F.2d 20, 31 (3d Cir. 1978).[7]

In 1979, the case was retried on remand, the district court allowed the case to go to the jury, and the jury found for the plaintiffs on liability. The jury answered separate interrogatories in which it found that the relevant market consisted of aluminum drainage pipe alone and that Kaiser had violated §1 and §2, but answered a single interrogatory that Kaiser's violations caused plaintiffs' injury, without distinguishing between the §1 and §2 violations. (J.A.87-89).

After the 1981 retrial on damages, judgment for treble damages was entered in favor of plaintiffs for $9,567,939 on December 4, 1981. (J.A.146). The district court thereafter granted j.n.o.v. on part of the

7. Kaiser's Petition For A Writ of Certiorari (No. 78-148 October Term 1978) raising, *inter alia,* the intra-enterprise conspiracy doctrine was denied by this Court. *Kaiser Aluminum & Chemical Corp. v. Columbia Metal Culvert Co., Inc.,* 439 U.S. 876 (1978).

$9,567,939 judgment, reducing it to $4,651,560. (J.A.183). Plaintiffs appealed the partial j.n.o.v. and Kaiser cross-appealed the liability issues, including the viability of plaintiffs' intra-enterprise conspiracy theory and the liability of a defendant for a "price squeeze," where the defendant did not supply the product to the allegedly injured plaintiff and therefore could not directly cause any alleged "squeeze". The Court of Appeals put the case in suspension pending this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which this Court had granted certiorari.

In *Copperweld,* decided June 19, 1984, this Court held that a parent and its wholly-owned subsidiary "are incapable of conspiring with each other for purposes of §1 of the Sherman Act." 467 U.S. at 777. Since the Kaiser subsidiary was a wholly-owned subsidiary, the *Copperweld* holding thus rendered at least the §1 liability finding invalid.[8]

Copperweld notwithstanding, the Court of Appeals upheld the liability finding against Kaiser under §2 of the Sherman Act. (J.A.185-211). When Kaiser petitioned for rehearing *in banc,* two Court of Appeals judges, Becker and Adams, voted to have the court *in banc* review the panel decision. Judge Adams, the author of the panel decision in the first appeal to the Court of Appeals, filed a written statement in which he questioned the panel's decision in light of *Copperweld* and further questioned whether the "price squeeze" doctrine should extend to a case where *"during the years in question plaintiff was purchasing its raw materials*

8. Kaiser argued that the §2 liability finding also could not stand. The jury had returned a single answer with respect to whether Kaiser's §1 and §2 violations *caused* plaintiffs' injuries. Thus, it was impossible to determine whether the causation finding rested on the invalid §1 theory. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.,* 370 U.S. 19 (1962).

from Alcoa and Reynolds, rather than from the defendant" and *"there is no evidence of any conspiracy between defendant and the other suppliers of the raw material." Bonjorno v. Kaiser Aluminum & Chemical Corp.,* Nos. 83-1047, 83-1079, slip op. at 3-4 (3d Cir. March 8, 1985).

When Kaiser requested that this Court review the liability determination, raising the issue of liability for an alleged "price squeeze" (No. 84-1907 October Term 1984, Petition For A Writ Of Certiorari) this Court requested the views of the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 474 U.S. 811 (1985). They informed this Court that they believed the Court of Appeals decision had "obvious shortcomings" and was "erroneous." *See* Brief For The United States As *Amicus Curiae,* No. 84-1907, at 9, 17 (May 1986). They observed that "Kaiser's conduct may well be characterized as no more than aggressive competition." *Id.* at 18. This Court denied certiorari with the notation that Mr. Justice White would have granted review. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 477 U.S. 908 (1986). Kaiser paid the judgment on July 3, 1986, the day after the $9,567,939 judgment was reinstated in the district court on remand from this Court and the Court of Appeals.

Although liability was eventually upheld in 1986, until then there were very substantial grounds for Kaiser to believe that plaintiffs' novel theory of liability would not prevail, particularly after this Court decided *Copperweld.* Plaintiffs' statement that "Kaiser knew, as of August 1979, that it was liable for treble damages for destruction of Plaintiffs' business . . ." (Brief, at 46) is plainly incorrect.

SUMMARY OF ARGUMENT

The federal postjudgment interest statute, 28 U.S.C. §1961, governs the calculation of postjudgment interest on "any money judgment in a civil case recovered in a district court." In this civil antitrust case, plaintiffs seek postjudgment interest on a money judgment of $9,567,939 entered in the district court for the Eastern District of Pennsylvania. Thus, §1961 applies to the calculation of postjudgment interest. The Court of Appeals was bound by its provisions. *See Pierce v. United States,* 255 U.S. 398, 406 (1921). To the extent that any federal court possesses "equitable" or "inherent" powers, these powers may not be exercised in a way that conflicts with a governing federal statute. Such powers do not permit the Courts of Appeals to deviate from the plain terms of §1961 when calculating postjudgment interest. *See, e.g., Norwest Bank Worthington v. Ahlers,* 108 S. Ct. 963, 968-69 (1988); *Thomas v. Arn,* 474 U.S. 140, 148 (1985).

Section 1961 prescribes both the *time period* during which postjudgment interest runs and the *rate* of postjudgment interest. With respect to *time period,* §1961 mandates that interest "shall be calculated" from the date of the "entry of the judgment" in the district court. In this case, the judgment was entered on December 4, 1981, and was reinstated on July 2, 1986. Therefore, postjudgment interest may not begin to accrue in this case prior to December 4, 1981. The Court of Appeals correctly rejected plaintiffs' request for postjudgment interest measured from August 1979 — two years *prior* to the entry of the judgment. Plaintiffs' request for interest *prior* to December 4, 1981 is nothing more than a request for *prejudgment* interest, to which they are not entitled.

Section 1961 also prescribes a specific *rate* of postjudgment interest. For postjudgment interest calculations on judgments entered prior to October 1, 1982,

§1961 provides that interest shall be calculated "at the rate allowed by State law." For postjudgment interest calculations on judgments entered after October 1, 1982, amended §1961 provides that interest shall be calculated "at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment." Plaintiffs' request for postjudgment interest at a "prime rate" — a rate that exceeds the rate set forth in both the prior and amended version of §1961 — conflicts with the plain terms of the governing federal statute. The Court of Appeals correctly rejected plaintiffs' position.

Were this Court to consider the "equities" in this case, plaintiffs nevertheless would not be entitled to postjudgment interest exceeding the amount prescribed by Congress. Any delay in plaintiffs' recovery of the $9,567,939 treble damage judgment was not the result of dilatory conduct on Kaiser's part or frivolous appeals by Kaiser. It only reflected the uncertainty of Kaiser's liability and plaintiffs' own failure of proof as shown by (i) the district court's original directed verdict in Kaiser's favor on liability; (ii) plaintiffs' initial failure of proof of damages, which led to a two-year delay and the necessity to retry the damage issues; (iii) two Court of Appeals judges voting in favor of *in banc* reconsideration of the panel decision affirming the 1979 liability finding; (iv) a dissent from denial of certiorari in this Court with respect to the underlying liability issues; (v) the Solicitor General's characterization of the Court of Appeals' decision upholding the jury's liability finding as erroneous; and (vi) the fact that all the appeals from the district court to the Court of Appeals have been initiated by plaintiffs, not by Kaiser.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT POSTJUDGMENT INTEREST MAY NOT RUN FROM THE DATE OF A VACATED JUDGMENT.

Despite the existence of a federal postjudgment interest statute permitting interest only from "the date of entry of the judgment," and despite the fact that *prejudgment* interest is clearly unavailable in this case, plaintiffs seek interest for a period of time *prior* to entry of a valid judgment and prior to the determination of the amount of their damages. Their request was properly denied by the Court of Appeals.

An award of postjudgment interest "is a charge for withholding the total amount of damages once that sum has been determined." Note, *Interest on Judgments In The Federal Courts,* 64 Yale L.J. 1019, 1019 (1955). Here, the amount of damages was not determined until 1981. Plaintiffs concede that postjudgment interest is intended to "preserve the value of a *judgment*." (Brief, at 40). The judgment to be preserved here was originally entered on December 4, 1981 and reinstated on July 2, 1986. Plaintiffs' request for interest for the period prior to entry of a valid judgment would not preserve the value of the judgment. Rather, it is simply a disguised request for an award of *prejudgment* interest, to which they are not entitled.

A. The 1979 Judgment Was Vacated Because Plaintiffs Did Not Prove Entitlement To Damages And The 1981 Judgment Was Not A "Recalculation".

Plaintiffs proffer a variety of unsound reasons why interest should run prior to the entry of the only valid judgment in their favor.

First, plaintiffs argue that "[t]his Court has recognized that interest on the judgment should be awarded from the date of the original judgment over periods of

court delay even if the amount of the judgment is subsequently altered." (Brief, at 18). In support of this proposition, plaintiffs cite four patently inapposite cases: *De La Rama v. De La Rama,* 241 U.S. 154, 159-60 (1916); *Kneeland v. American Loan & Trust Co.,* 138 U.S. 509 (1891); *Ex Parte Republic of Colombia,* 195 U.S. 604 (1904); *The Conemaugh,* 189 U.S. 363 (1903). In each of these four cases, an appellate court reduced a lower court monetary award and the court allowed interest on the lower amount from the date the underlying award was entered in the trial court. In each of those cases, a part of the underlying monetary award was left standing and interest was awarded on that amount. Obviously, these cases have no application here, where the August 22, 1979 judgment was *wholly vacated* by the lower court because of plaintiffs' failure of proof and was not thereafter "altered", "modified" or "recalculated".

The reasoning underlying these four cases is set forth in *Kneeland,* where the Court explained that the appellate decision "in so far as the separate and distinct matters embraced in the former decrees were ordered to be incorporated into the new, it is to be regarded as *pro tanto* an affirmance." *Id.* at 511-12. Thus, these cases simply embody the principle of Fed. R. App. P. 37, that where a judgment for money is *affirmed* by the Court of Appeals, interest runs from the date of judgment in the district court.

Here, the 1979 damage award was vacated *in its entirety*. It was not altered, reduced, modified, recalculated or affirmed on appeal. It was not even appealed.[9]

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9. Plaintiffs incorrectly assert that they could not appeal the district court's Order vacating the 1979 judgment. While the Order was not immediately appealable, review could have been obtained when plaintiffs appealed to the Third Circuit in 1983. *See Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34 (1980). Indeed, if plaintiffs thought themselves entitled to interest on that 1979 judgment, they clearly should have appealed the Order at that time.

The district court vacated the August 22, 1979 judgment because plaintiffs' damage evidence "was so deficient as to require a new trial. . . ." Plaintiffs' evidence was "incomplete, confusing and generally lacking in probative value." (J.A.112). Plaintiffs' evidence was illusory and "created a speculative verdict. . . ." (J.A.117). The court concluded — and plaintiffs never contested this conclusion — that "[t]he deficiency in plaintiff's proof of damages convinces the court that the verdict as to damages should not stand." (J.A.120).

Plaintiffs also contend that postjudgment interest should run from August 22, 1979, because by that date, the jury had returned a *liability* verdict.[10] Plaintiffs proffer the following convoluted reasoning unsupported by any authority:

> . . . there is certainly no justification for denying interest *after* the date the jury finds (which finding is never thereafter set aside) that the wrongdoer unlawfully caused damage in some amount. At that point the Defendant knows it has a damage exposure (albeit in an undetermined amount) that it cannot avoid. Mindful of this very situation, and the ever more prevalent practice of bifurcated trials between liability and damages, the Federal Rules of Civil Procedure wisely give the Defendant the option of stopping or cutting back on the running of

NOTES *(Continued)*

Having failed to contest the district court's vacation of the August 22, 1979 judgment, plaintiffs must concede that a valid judgment in their favor was not entered until after the retrial on damages in 1981.

10. Plaintiffs do not argue that interest should run from the date of the liability verdict returned on August 16, 1979, but argue rather that it should run from the vacated judgment entered on August 22, 1979. Interest measured from a *verdict* would be contrary to the specific terms of §1961, as Kaiser has argued at length in its Brief For Petitioners in No. 88-1595.

> interest by tendering what it feels may be its ultimate damage responsibility.

(Brief, at 19-20). Thus, plaintiffs argue that despite the fact that the federal statute governing the calculation of postjudgment interest specifically provides that interest runs from the date of "*the entry of the judgment*," a defendant against whom a liability verdict but no valid *judgment* has been entered should guess at "*what it feels may be its ultimate damage responsibility*" and hand it over to the plaintiff, who has neither proved the amount of its damages nor obtained a judgment.

Surely the law does not require such an absurd thing. Fed. R. Civ. P. 67, which plaintiffs cite in support of this position, deals with paying money *into court,* not tendering money to the plaintiff. Moreover, Rule 67 does not address the issue whether paying money into court stops the running of postjudgment interest. Indeed, at least two courts have held that deposit into court under this rule does not stop the running of interest. *See, e.g., United States ex rel. Garrett v. Midwest Const. Co.,* 619 F.2d 349, 353-54 (5th Cir. 1980); *Blasini-Stern v. Beech-Nut Life Savers Corp.,* 429 F. Supp. 533, 534-35 (D. Puerto Rico 1975).

Plaintiffs' request for interest beginning in 1979 is nothing more than a request for interest from the date of a liability verdict. Section 1961, however, only permits interest measured from the date of "entry of the *judgment.*" Plaintiffs are not entitled to *postjudgment* interest until they have obtained a valid *judgment.* As both the Court of Appeals and the district court observed in this case, the "verdict on liability alone was insufficient under Fed. R. Civ. P. 54(c) to allow or require the court to enter judgment." (P.A.11, 40-41). A construction of the postjudgment interest statute which would allow postjudgment interest from the jury's liability finding cannot be squared with the plain language of the statute. That construction was properly rejected by the

court below. *See, e.g., Mansell v. Mansell,* 109 S. Ct. 2023, 2030 (1989) (litigant attempting to construe statute contrary to its plain language bears difficult burden).

The conceded purpose of postjudgment interest is to preserve the value of the judgment from the time the judgment is entered until payment. Plaintiffs initially obtained "the judgment" of $9,567,939 on December 4, 1981. The December 4, 1981 judgment was reinstated on July 2, 1986. Thus, the only two possible dates from which interest may run to preserve the value of the judgment are December 4, 1981 or July 2, 1986.

B. Plaintiffs' Request For Interest Measured From 1979 Is A Request For Prejudgment Interest To Which Plaintiffs Are Not Entitled.

Plaintiffs' request for interest for the period prior to entry of a valid judgment in their favor boils down to nothing more than a request for *prejudgment* interest. Plaintiffs' explanation why interest should accrue during this period makes this obvious. Pointing out that their *damages* were calculated as of 1977, they suggest that to deny interest on the damages from 1979 until 1981 would be to deny full compensation.[11] (Brief, at 20 n.28). However, this Court has recently explained that it is *prejudgment* interest, not *postjudgment* interest, which "serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation. . . ." *West Virginia v. United States,* 479 U.S. 305, 310 n.2 (1987). Postjudgment interest only serves to

11. The elements of damage plaintiffs sought were lost profits up to May 31, 1977 and the value of the business of Columbia Metal Culvert Co., Inc. as a going concern as of that date. The value of the business as a going concern was calculated by discounting a projected stream of profits in the future from May 31, 1977. Consequently, plaintiffs' damages, in fact, included an element of damages for the period following May 31, 1977.

preserve the value of the judgment from the date the judgment is entered.

Plaintiffs plainly are not entitled to prejudgment interest. Prior to 1980, the antitrust laws did not permit recovery of prejudgment interest at all. *See, e.g., Fishman v. Estate of Wirtz,* 807 F.2d 520, 562 (7th Cir. 1986); *Trio Process Corp. v. L. Goldstein's Sons, Inc.,* 638 F.2d 661, 663 (3d Cir. 1981); *Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973); H. Rep. No. 96-875, 96th Cong., 2d Sess. 5, *reprinted in* 1989 U.S. Code Cong. & Admin. News 2766, 2769. The Second Circuit reasoned that "treble damages are sufficient penalty" and "interest need not be included." *Trans World Airlines,* 449 F.2d at 80. In 1980, Congress enacted the Antitrust Improvements Act, which provided for prejudgment interest under certain circumstances for cases filed after its enactment.[12] Although its provisions are not applicable to this case, the present statutory prerequisites[13] for an award of prejudgment

12. Section 4(b) of The Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154, 1157, provided that: "The amendments made by this section [amending Section 15(a)] shall apply only with respect to actions commenced after the date of the enactment of this Act [Sept. 12, 1980]."

13. Section 4 of the Clayton Act, 15 U.S.C. 15(a), as it currently reads, provides in part that:

> The court may award under this section, pursuant to a motion by such person promptly made, *simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment,* or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider *only* –
>
> (1) whether such person or the opposing party, or either party's representative, *made motions or asserted claims or defenses so lacking in merit* as to show that such

interest highlight the reasons why plaintiffs may not recover interest on the treble damages for the period prior to December 4, 1981.

Under the 1980 statute, a statute specifically designed by Congress to permit prejudgment interest in appropriate cases, the trial court must first determine that the defendant engaged in dilatory conduct. Additionally, the statute only authorizes prejudgment interest on *single* damages, not the prejudgment interest on *treble* damages to which plaintiffs contend they are entitled in this case.

The district court in this case specifically found that the "appeals of Kaiser to the Court of Appeals and the petition for certiorari to the Supreme Court were not frivolous and not for the purpose of delay. . . ." (P.A.46-47). Although they argue that they should receive an award of interest beyond that permitted by 28 U.S.C. §1961 as a general disincentive to all litigants to "delay payment by exhausting all post-trial and appellate remedies that the judicial process allows," (Brief, at 13), plaintiffs do not argue that Kaiser engaged in intentional delay tactics. Putting to one side the explicit finding by

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NOTES *(Continued)*

party or representative *acted intentionally for delay, or otherwise acted in bad faith;*

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, *violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior* or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, *engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.*

The legislative history of the prejudgment interest amendment to 15 U.S.C. §15(a) shows that Congress was concerned primarily with providing a disincentive for intentional delaying tactics by defendants "anticipating an unfavorable judgment." H. Rep. No. 96-875, 96th Cong., 2d Sess. 2, 7, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2767, 2771.

the district court that Kaiser did not engage in dilatory tactics, the fact that one district court judge, two Court of Appeals judges, the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division (and possibly one member of this Court) questioned whether Kaiser was liable in this case renders it impossible for plaintiffs to make the requisite showing under amended §15(a).

1. The Seventh Circuit's Analysis In *Needham v. White Laboratories, Inc.* Should Be Applied In this Case.

In a very similar case, the Court of Appeals for the Seventh Circuit refused to award interest from the date of a vacated judgment. *Needham v. White Laboratories, Inc.*, 847 F.2d 355 (7th Cir. 1988). Needham obtained a judgment in 1979 for $800,000 in a products liability action. The Court of Appeals reversed the judgment because of error in the admission of evidence and remanded for a new trial. The district court ordered a new trial limited to the liability issue, deciding that, if plaintiff won again, her damages would be the same $800,000 that she had been awarded at the end of the first trial. Needham again prevailed and was awarded $800,000. *Id.* at 357. The new judgment was not entered until some time after November, 1986. *Id.*

Needham sought interest on the $800,000 judgment entered in 1986 from 1979, arguing "that if $800,000 was a correct assessment of her damages in 1979 (which no one questions) it *must* be too little" seven years later. *Id.* at 360. (emphasis in original). Just as plaintiffs have done here, the "plaintiff trie[d] to convert the issue into one of postjudgment interest. . ." *Id.* at 361. The Court of Appeals for the Seventh Circuit, in an opinion authored by Judge Posner, correctly concluded that the plaintiff was not seeking *postjudgment* interest, but rather an award of *prejudgment* interest. It

stated that although "courts award postjudgment interest from the date of a judgment that was reinstated after having been set aside by the trial judge or reversed by an intermediate appellate court, that is not what happened here. *The 1979 judgment was never reinstated.* It was set aside, the case was retried, and a new judgment was entered, albeit one identical in amount to the old judgment." *Id.* The Court of Appeals proceeded to consider whether *prejudgment* interest was available and found that it was not. *Id.* at 361-62.

The *Needham* reasoning is sound and applies with full force here. Plaintiffs may not convert the issue into one of postjudgment interest. Congress has determined that the date of entry of the judgment divides prejudgment interest from postjudgment interest. Judgment in this case was initially entered on December 4, 1981. An interest award covering any period prior to that date would constitute an award of prejudgment interest to which plaintiffs clearly are not entitled.

2. The Ninth Circuit's Decision In *Handgards* Does not Support Calculation Of Interest From August 22, 1979.

In support of their position that interest should run from the August 22, 1979 vacated judgment, plaintiffs place primary reliance on *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985). That case is readily distinguishable and, in any event, was incorrectly decided.

The Ninth Circuit's decision was grounded on two prior Ninth Circuit cases: *Mt. Hood Stages, Inc. v. The Greyhound Corp.*, 616 F.2d 394, 406 (9th Cir.), *cert. denied,* 449 U.S. 831 (1980), and *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1310 (9th Cir.), *cert. denied,* 459 U.S. 1009 (1982). In those cases, appeals were taken solely on the issue of the statute of limitations. The determination of the amount

of damages was not questioned or appealed. When the statute of limitations issue was resolved and liability was reaffirmed, the identical damage judgments were restored without reconsideration. The courts allowed postjudgment interest calculated from the date damages were initially determined, even though the judgments were not entered until after the appeal.

In *Handgards,* the court followed this reasoning in a case where, after the liability appeal, a second jury was permitted to reconsider the amount of damages and a higher damage amount was found. The court found that the first damage judgment and the second damage judgment were essentially identical: both were valid and both included the same elements. Only the standard with respect to liability had been addressed and altered as a result of an appeal. *See Handgards,* 743 F.2d at 1299 ("it can be said that the second judgment 'remains the same – in the same amount, for the same damages incurred during the same period' ") (quoting *Twin City,* 676 F.2d at 1311).

The *Mt. Hood, Twin City* and *Handgards* decisions do not apply here, where the first damage verdict was vacated because it was patently *defective.* The judgment entered here on December 4, 1981 can in no way be said to be the "same" as the 1979 defective judgment. Moreover, the approach taken in the Ninth Circuit's *Handgards* line of cases is wrong and should not be followed by this Court. Clearly, the measurement of interest may not begin until plaintiff has adequately proven the existence of its damages. *Needham* represents the better view, recognizing that until entry of a judgment based on a valid liability finding *and* a valid damage assessment, any interest is *prejudgment* interest and its availability must be evaluated under the applicable standards for an award of *prejudgment* interest.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT IT HAD NO POWER TO DEVIATE FROM THE POSTJUDGMENT INTEREST RATE MANDATED BY THE FEDERAL POSTJUDGMENT INTEREST STATUTE.

Plaintiffs ask this Court to hold that the Court of Appeals erred in not awarding postjudgment interest at a floating *prime rate,* compounded monthly, notwithstanding a federal statute prescribing a *fixed* rate of postjudgment interest, not keyed to a prime rate, that does not compound monthly.[14]

A. The Court Of Appeals Was Bound By The Terms Of §1961.

Prior to 1982, §1961 provided that interest on "any money judgment in a civil case recovered in a district court . . . *shall be calculated* from the date of the entry of the judgment, *at the rate allowed by State law.*" Amended §1961 provides that:

> . . . interest *shall be calculated* from the date of the entry of the judgment, *at a rate equal to the* coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
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> * * *
>
> Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be *compounded annually.*

28 U.S.C. §1961.

Plaintiffs declare that §1961 is simply a "rule of convenience" for "run-of-the-mill" judgments. Plaintiffs contend that the statute "merely mandates the minimum 'floor' amount of interest that must be awarded as a matter of course on all judgments entered in federal District Courts. . . ." (Brief, at 8, 32 n.47). Plaintiffs suggest the Court of Appeals should have exercised its "inherent equitable power" to award interest at a floating *prime rate,* compounded monthly.

Plaintiffs' argument is without merit. Plaintiffs cite no authority for this notion and overlook the explicit mandate of §1961. The federal lawmaking power "is vested in the legislative, not the judicial, branch of government." *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 95 (1981). In a case similar to this one, where respondents were advocating a judicially-created basis for recovery of attorneys' fees, this Court observed that "it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents . . ." *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 271 (1975). Here, Congress has prescribed the appropriate rate of postjudgment interest in the prior and amended versions of §1961. The Court of Appeals properly held itself bound to apply the law enacted by Congress.

This Court has previously rejected similar attempts by litigants to obtain postjudgment interest beyond the amount allowed by statute. In *Pierce v. United States,* 255 U.S. 398, 406 (1921), this Court stated:

> At common law judgments do not bear interest; *interest rests solely upon statutory provision. The*

14. Depending on the outcome of Kaiser's Petition to this Court, No. 88-1595, involving the retroactivity of the amendment to §1961, which changed the applicable rate, the applicable statutory rate is either six percent simple interest or the T-bill rate fixed by amended §1961, which provides for compounding annually.

> *only applicable statute of the United States is section 966 of the Revised Statutes (Comp. St. §1605)* (citations omitted).[15]

As recently as 1987, the Court acknowledged the rule set forth in *Pierce* that, except when this Court enters a judgment pursuant to its original jurisdiction, "post-judgment interest may not be awarded absent statutory authority." *Texas v. New Mexico,* 482 U.S. 124, 132-33 n.8 (1987).[16] In *Monessen S. Ry. v. Morgan,* 108 S. Ct. 1837, 1843 (1988), this Court held that successful plaintiffs in FELA actions are not entitled to *prejudgment* interest absent evidence that Congress intended to depart from the *Pierce* rule that interest on judgments must have its source in a federal statute.

Plaintiffs have produced no authority to the contrary. They cite four decisions of this Court that purportedly illustrate "the power of the federal courts to award interest independent of any statutory authority granted by Congress." (Brief, at 35). Not one of these four cases even addresses postjudgment interest. *West Virginia v. United States,* 479 U.S. 305, 308-09 (1987) (prejudgment interest on contractual obligation to pay money); *Billings v. United States,* 232 U.S. 261, 285-87 (1914) (interest as an element of damages in tax delinquency case); *National Bank of the Commonwealth v. Mechanics' Nat'l Bank,* 94 U.S. 437 (1877) (interest on claims to which the federal postjudgment interest statute *did not apply* because not a "judgment"); *Perkins v. Fourniquet,* 55 U.S. (14 How.) 328 (1853) (equitable decree to which postjudgment interest statute did not apply).[17]

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15. Section 966 was the predecessor statute to §1961.

16. Rule 49.1 of this Court, which deals with interest, provides that "[i]nterest will be allowed at the same rate that similar judgments bear interest in the courts of the State where the judgment was entered or was directed to be entered."

17. Significantly, in *Mechanics' Nat'l Bank,* even though the predecessor postjudgment interest statute to §1961 did not apply, this Court borrowed the specific rate contained in the statute. And in *Perkins* the Court used a *lower* rate.

When Congress has prescribed, in mandatory terms, the interest rate on judgments recovered in district court, a litigant may not recover postjudgment interest at some other rate. *See Norwest Bank Worthington v. Ahlers,* 108 S. Ct. 963, 968-69 (1988) (rejecting "equitable arguments" for departure from mandatory terms of Bankruptcy Code on ground that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"); *Thomas v. Arn,* 474 U.S. 140, 148 (1985) (any use of court's inherent "supervisory" power is invalid "if it conflicts with constitutional or statutory provisions"). *See generally* Beale, *Reconsidering Supervisory Power In Criminal Cases: Constitutional And Statutory Limits On The Authority Of The Federal Courts,* 84 Colum. L. Rev. 1433 (1984) (any inherent power of federal courts must be exercised within the confines of federal statutes).

B. Plaintiffs' "Discretionary" Approach Would Encourage Litigation Regarding Postjudgment Interest, Frustrate The Interest In Finality Of Litigation And Discriminate Unfairly Among Judgment Debtors On The Basis Of The Length Of The Case And Perceived Importance Of The Issues.

The Court of Appeals properly rejected plaintiffs' argument that in "exceptional" or "non-run-of-the-mill" cases courts possess "equitable discretion" to vary the postjudgment interest rate from that specified by Congress in the postjudgment interest statute. Any other result would create confusion and encourage appeals on the issue of postjudgment interest, as in this case, in which the litigation of the interest issues has already consumed three years. The postjudgment interest calculation would present to each litigant the opportunity to argue that the case was an "exceptional" one which merited deviation from the general rule. In addition,

once it found the case "exceptional", a court would be required to determine what rate of interest would adequately compensate that particular plaintiff.

Plaintiffs also fail to articulate with precision why a case might be deemed "exceptional", thus permitting deviation from the terms of §1961. They repeatedly state that Congress' specific resolution of the issue in §1961 is merely a "rule of convenience" and suggest that the statute should apply only to "routine" or "run-of-the-mill" cases and judgments. Plaintiffs argue that the courts can and should simply ignore §1961 in other cases. (Brief, at 8, 12, 22, 38). They imply that this case is in some sense different from a "run-of-the-mill" case. However, plaintiffs' suggestion is contradicted by the explicit language of both prior and amended §1961, which states, without exception, that the rate applies to "*any* money judgment in a civil case recovered in a district court." *See Mansell v. Mansell,* 109 S. Ct. 2023, 2030 (1989).

In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 269-71 (1975), this Court refused to award attorneys' fees to successful plaintiffs absent Congressional authorization. The plaintiffs there had advanced an approach similar to that suggested by plaintiffs here – that their recovery should hinge on the fact that they were acting as private attorneys general in vindicating important national interests. The Court observed that Congress had specifically legislated on the subject of attorneys' fees, as it has in the area of postjudgment interest, and therefore, the discretionary rule suggested by the plaintiffs in *Alyeska* "would make major inroads on a policy matter that Congress has reserved for itself." *Id.* at 269. In rejecting plaintiffs' approach, the Court reasoned that "courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some

cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." *Id.*

This reasoning applies with equal force here. Congress enacted specific legislation governing the calculation of postjudgment interest on judgments entered in the district courts. The case-by-case, discretionary approach to the calculation of postjudgment interest suggested by plaintiffs "invades the legislature's province" and was properly rejected by the Court of Appeals. *Alyeska,* 421 U.S. at 271.

C. Section 1961 Applies To The Calculation Of Postjudgment Interest On The Money Judgment In This Case.

Plaintiffs also attempt to argue that §1961 "does not apply to judgments of the federal Courts of Appeals." (Brief, at 35-36). This suggestion likewise has no merit.

Plaintiffs are not seeking interest on a Court of Appeals' judgment.[18] They seek postjudgment interest on the $9,567,939 judgment *entered in the district court.* Section 1961 specifically applies to the calculation of interest on "any money judgment in a civil case recovered in a district court." 28 U.S.C. §1961. The statute's application does not depend on which court performs the interest calculation.

Plaintiffs further suggest that 28 U.S.C. §1912, rather than §1961, applies to the calculation of interest by the Court of Appeals. This argument is also incorrect. Section 1912 clearly does not apply here. That section provides that "[w]here a judgment is *affirmed* by the Supreme Court or a Court of Appeals, the court in its

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18. As a result of its exclusively appellate jurisdiction, the Court of Appeals does not generally enter money judgments and the December 4, 1981 judgment was not a judgment for money. *See* 28 U.S.C. §§1291-1295.

discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." This section has uniformly been construed to apply only where the Court of Appeals *affirms* a judgment and makes the determination that the losing party filed a frivolous appeal for the purpose of delay. *See, e.g., Deming v. Carlisle Packing Co.,* 226 U.S. 102 (1912) (construing predecessor statute); *Grimes v. Commissioner,* 806 F.2d 1451, 1454 (9th Cir. 1986); *In re American Pres. Lines, Ltd.,* 804 F.2d 1307, 1310 (D.C. Cir. 1986); *Emaldio v. Pocahontas S.S. Co.,* 355 F.2d 55, 57 (4th Cir. 1966). The Court of Appeals never "affirmed" a judgment in this case either in the appeals on the merits, or with respect to postjudgment interest.[19] Additionally, cross-petitioners have not even argued that Kaiser's cross-appeals were frivolous or taken solely for delay. Section 1912 clearly does not apply here.

The Court of Appeals correctly applied the rate prescribed in §1961 to calculate postjudgment interest, rather than resorting to some novel, speculative and variable "equitable" measure of postjudgment interest derived from §1912, a statute that clearly has no application to the case.

D. Rule 37 Does Not Expand The Authority To Award Postjudgment Interest In A Way Inconsistent With The Terms Of §1961.

Respondents next suggest that Fed. R. App. P. 37 allows the Court of Appeals "equitable" discretion to depart from the express terms of §1961 and calculate

19. In the initial appeal by plaintiffs by on the merits, the Court of Appeals *reversed* the directed verdict entered in the district court in Kaiser's favor. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* 579 F.2d 20 (3d Cir. 1978). In the second merits appeal, which once again was an appeal the plaintiffs initiated, the Court of Appeals reversed in part and affirmed in part. (J.A.185). In its postjudgment interest decision, it reversed in part and affirmed in part. (P.A.3).

postjudgment interest without regard to the statutorily-prescribed rate. This argument has no merit, and this court has rejected similar arguments in related contexts. *See Norwest Bank Worthington v. Ahlers,* 108 S. Ct. 963, 968-69 (1988) (court's "equitable" powers do not permit it to depart from terms of federal statutes).

Fed. R. App. P. 37 provides that "[i]f a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest." This Court has consistently explained that, pursuant to 28 U.S.C. §2071, the rules promulgated by all federal courts "must also be consistent with Acts of Congress." *Frazier v. Heebe,* 482 U.S. 641, 646 n.4 (1987). *See Colgrove v. Battin,* 413 U.S. 149, 161 n.18 (1973) (if a rule "would conflict with an Act of Congress" it "would therefore be invalid"). To be a valid rule, therefore, Rule 37 must be read in harmony with 28 U.S.C. §1961 and must encompass its requirements with respect to the appropriate rate of postjudgment interest.

It is well established that "courts are not at liberty to pick and choose among Congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari,* 417 U.S. 535, 551 (1974). *See Watt v. Alaska,* 451 U.S. 259, 266-67 (1981). The Federal Rules of Appellate Procedure have the force and effect of statutes. *See, e.g., Sibbach v. Wilson & Co.,* 312 U.S. 1 (1941). This principle requires that Rule 37 be construed consistently with §1961.

Rule 37 does not by its terms conflict with §1961 and the two provisions are easily "capable of co-existence." When there are two valid "judgments" from which interest might be calculated under the terms of §1961, Rule 37 simply gives the Court of Appeals the discretion to choose between the two. In all other

respects, including time period and interest rate, Rule 37 should be construed to include the mandatory terms of 1961. *See, e.g., Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1018 (1984); *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 133-34 (1974); *Morton v. Mancari,* 417 U.S. 535, 551 (1974).[20]

E. Prime Rate Interest, Compounded Monthly, Would Overcompensate Plaintiffs And Would Be Manifestly Unjust.

Putting aside the clear unavailability of postjudgment interest at a rate higher than the rate specified in 28 U.S.C. §1961, the rate sought by plaintiffs is unreasonable and inequitable. The purpose of postjudgment interest is to put the plaintiffs in the position they would have been in had the defendant paid the judgment on the date the judgment was entered in the district court. Had they received the judgment on that date, the only reasonable assumption is that plaintiffs would have invested the money in some reasonably safe investment. Thus, *saving interest rates* (such as T-bill rates), not *borrowing rates,* would serve to compensate them for delay in payment. Plaintiffs concede that the "prime rate" interest they seek is a borrowing interest rate. They do not contend they would have earned prime rate

20. The Rules Enabling Act, pursuant to which Rule 37 was promulgated, explicitly declares that the rules thereunder "shall not abridge, enlarge or modify substantive rights." 28 U.S.C. §2072. *See Burlington N.R.R. v. Woods,* 480 U.S. 1, 5 (1987). Although a number of lower courts have held that postjudgment interest is "procedural" for purposes of choosing the applicable law in a diversity case, this Court has explicitly held that entitlement to prejudgment interest is a substantive right and has assumed, without deciding, that entitlement to postjudgment interest is a substantive right. *See Monessen S. Ry. v. Morgan,* 108 S. Ct. 1837 (1988); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 815-16 (1985). Accordingly, Rule 37 should not be interpreted to enlarge the availability of postjudgment interest as provided in §1961.

interest through investment had they received the judgment prior to July 3, 1986. *See* Brief, at 7 (rate sought is "market calculation for commercial borrowers"). Thus, prime rate interest would overcompensate plaintiffs for any delay between entry of judgment and payment.

Plaintiffs also hint that they should receive prime rate postjudgment interest simply because Kaiser filed post-trial motions, appeals and petitions for certiorari. (Brief, at 46). This argument has no merit. Congress enacted a statute and authorized a rule of appellate procedure providing a mechanism for an aggrieved prevailing appellant to recover monetary sanctions if a court determines that an appeal is frivolous. *See* 28 U.S.C. §1912; Fed. R. App. P. 38; *Burlington N.R.R. v. Woods,* 480 U.S. 1 (1987). In antitrust cases, Congress has further articulated standards under which delay damages might be available in cases commenced after September 30, 1980 to deter dilatory behavior. 15 U.S.C. §15(a). Thus, there is no reason for a court to misconstrue postjudgment interest and use it punitively.

Kaiser repeatedly obtained relief in the district court on its post-trial motions. Moreover, it was plaintiffs, not Kaiser, who initiated *all three of the appeals* from the district court to the Court of Appeals in this case. Even with respect to the issues upon which plaintiffs ultimately prevailed, the courts were divided and the victories were not always unanimous. For instance, one district court granted a directed verdict to Kaiser on the entire issue of liability. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* No. 74-122, mem. op. (E.D. Pa. July 20, 1977). In the second appeal, Circuit Judges Adams and Becker dissented from the denial of rehearing and voted for *in banc* review of the liability finding. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, Nos. 83-1047, 83-1079, slip op. (3d Cir. March 8, 1985). Justice White of this Court would have granted certiorari on the liability issues. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 477 U.S. 908

(1986). In the court below, Judge Stapleton dissented and three circuit judges voted for rehearing on the postjudgment interest issues. (P.A. 25, 29-30).

The post-trial motions, appeals and petitions for certiorari in this case were not frivolous, were not "relitigated", and were not pursued for purposes of receiving the benefit of the time value of money. Plaintiffs' suppressed premise that Kaiser should pay prime rate postjudgment interest as a deterrent to frivolous litigation is belied by the record and can safely be rejected by this Court.

CONCLUSION

Plaintiffs' arguments were correctly rejected by the Court of Appeals.

There is no authority for a federal district court or a Court of Appeals to award postjudgment interest beyond the amount prescribed by Congress in 28 U.S.C. §1961. Plaintiffs' attempt to obtain postjudgment interest prior to the date judgment was entered is nothing more than a disguised request for prejudgment interest to which plaintiffs are not entitled. Interest at "prime rate" is inconsistent with the unambiguous, mandatory rate specified in §1961. Such an award is neither within the "equitable" nor "inherent" power of the district court or the Court of Appeals. Further, it would overcompensate plaintiffs and penalize Kaiser for exercising its appellate rights in a case where liability was not clear. It clearly would be inequitable.

The decision of the Court of Appeals for the Third Circuit should be affirmed insofar as it held that interest may not be awarded for the period from August 22, 1979 to December 1981 and may not be calculated at a rate different from the rate prescribed by Congress in 28 U.S.C. §1961.

Respectfully submitted,

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No. 88-1771

In The

Supreme Court of the United States

October Term, 1989

JOSEPH A. BONJORNO, LORRAINE KERR,
(EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.,)
AND BARBARA K. CLISBY,

Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION
and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents.

**On Writ Of Certiorari To The
United States Court Of
Appeals For The Third Circuit**

REPLY BRIEF FOR CROSS-PETITIONERS

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KAISER'S ARGUMENTS DO NOT SUPPORT DENIAL OF ADEQUATE INTEREST FROM THE 1979 JUDGMENT

Kaiser, in its Brief for Cross-Respondents ("Kaiser Response"), – responding to Plaintiffs' Petition for an award of interest at commercial market rates, over the full period since the original 1979 judgment, – ignores this Court's holdings and contends that a court of law and equity is powerless[1] to protect and preserve the integrity of its own judgments[2] against decline in value resulting from delays in the judicial process,[3] and to carry out the fourfold purposes of interest awards in cases such as this:

- ¶ preserve judgments against diminution;
- ¶ prevent unjust enrichment of defendant at plaintiff's expense;
- ¶ vindicate congressionally mandated policy to preserve free trade;
- ¶ eliminate incentives for court delay after adverse judgment.[4]

Kaiser does not contest that its cost of money was at least prime rate or that it has benefited over the past ten years by more than $18.5 million from the use of Plaintiffs' money by delaying payment of the judgment for seven years and still avoiding any interest payments to this day. Instead, Kaiser contends that the Court of Appeals should not disgorge

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[1] *Cf.* Kaiser's inequitable argument that Courts of Appeals are powerless to award the amount of interest necessary and appropriate "in order *adequately to preserve the value of the judgment*." Kaiser Brief In Opposition to Plaintiffs' Cross-Petition at 6 (emphasis added).

[2] *Cf. Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9-10 (1942) ("appellate court should be able to prevent irreparable injury" relating to enforcement and stay of execution on judgments); *Ex Parte Peterson*, 253 U.S. 300, 312 (1920).

[3] *See* Brief for Cross-Petitioners on the Merits of Plaintiffs' Cross-Petition ("Plaintiffs' Opening Brief") at 31-41; *see also* pp. 11-18 below.

[4] *See* Plaintiffs' Opening Brief at 13.

Kaiser's gain because Plaintiffs' loss – posits Kaiser without a shred of evidence – should be measured at savings account or T-bill rates. Kaiser Response at 30.

Kaiser ignores the record evidence that Plaintiffs' cost of money, in their desperate effort to rebuild a business destroyed by Kaiser, was 2.5 points *above* prime. (J.A. 290-91). Moreover, had Plaintiffs received their funds when due, and alternatively put them in an established investment fund, their $9.5 million as of 1979 would now be worth as much as from $34 to $120 million.[5]

Kaiser, to mask the gross inequities flowing from its contentions, and to divert attention from its begrudging and belated concessions regarding the fourfold purposes of interest,[6] ignores the real issues. Instead it poses a host of ill-conceived and misdirected arguments in its Response, that are not only unsupported, but are also irrelevant, make no common sense, and are flat wrong:

1. KAISER'S IRRELEVANT ATTEMPTS TO DOWN-PLAY ITS EGREGIOUS WRONGS: Kaiser Incorrectly Argues That Because Its Liability Was "Far From Clear," Interest Should Not Run From 1979 When Liability Was Established

Kaiser cannot now relitigate its liability which was established in 1979. Its self-serving declaration that its liability was "far from clear" is contradicted by the repeated affirmance of

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[5] *See* p. 16 n.28 below.

[6] Kaiser concedes that interest on the judgment should preserve the value of the judgment, but attempts to overlook the precedent and logic mandating that such interest run from the original judgment. *See* Kaiser Response at 16, 30.

Even on Kaiser's limited concessions, Kaiser's arguments in No. 88-1595 for 6% simple interest ($2.6 million) – or only one day of interest – seek results that manifestly fail to carry out the now conceded purposes of interest awards, and properly were rejected by the court below. The real issues for this Court are on Plaintiffs' Petition.

its liability in the face of each challenge by Kaiser.[7] Kaiser's refusal to accept the courts' judgments states no basis to deny interest over the seven years from establishment of liability in 1979 to this Court's denial of its second certiorari petition in 1986. To the contrary, Kaiser is bound not only by the 1979 liability findings that its predatory and anticompetitive conduct caused the destruction of Plaintiffs' business from the early 1970's to 1977, but also by the conclusive and preclusive determination of the 1981 jury that the only error of the 1979 jury was in awarding *too little* damages.

The 1979 judgment was correct on the facts and law of this case, except that it was $4 million too low. In affirming this 1979 liability and the 1981 damage recalculation, the Court of Appeals appropriately should grant interest on the judgment from 1979.[8]

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[7] The sufficiency of the evidence to establish liability under 15 U.S.C. §2 was determined by the Court of Appeals in 1978. Plaintiffs' Opening Brief at 3.

Kaiser's liability was established in 1979 – not 1986 (*cf.* Kaiser Response at 5-9) – and has never been reversed, overruled or vacated. Plaintiffs' Opening Brief at 4-5. To the contrary, the 1979 jury's liability finding was *affirmed:* (1) by the District Court on Kaiser's 1979 post-trial motions (J.A. 127); and (2) by the Court of Appeals in its 1984 judgment (J.A. 190-98), on which Plaintiffs seek interest.

See also Supplemental Brief For Respondents Occasioned By The Filing Of An Amicus Curiae Brief On Behalf Of The United States, No. 84-1907 (U.S.) (noting heavy weight of *cumulative evidence* on liability, independent of price squeeze issue Kaiser again seeks to relitigate).

[8] Kaiser's Response at 15 is flat wrong in suggesting that Kaiser could not have stopped or reduced interest either by tendering money to Plaintiffs instead of obtaining stays or by tendering money into court under Fed. R. Civ. P. 67.

In the Third Circuit, a Rule 67 payment into court *can* reduce the running of interest. *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985); *Devex Corp. v. General Motors Corp.*, 638 F. Supp. 940, 944 (D. Del. 1986), *aff'd*, 822 F.2d 52 (3d Cir. 1987), *reversed on other issue*, 108 S. Ct. 2862, *aff'd on remand*, 857 F.2d 197 (3d Cir. 1988); *Fassbinder v. Pennsylvania R.R. Co.*, 233 F. Supp. 574, 576 (W.D. Pa. 1964).

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2. KAISER'S IRRELEVANT ATTEMPTS TO BLAME PLAINTIFFS FOR DELAYS INHERENT IN THE JUDICIAL PROCESS AS A BAR TO THEIR INTEREST CLAIM: Kaiser Wrongly Argues That Courts Should Or Can Weigh Responsibility For Delays Inherent In The Judicial Process Absent Bad Faith

Kaiser's Response at 14 incorrectly attempts to deny Kaiser's obligation for 2½ years of interest on the judgment by contending that Plaintiffs were somehow at fault for delay. Kaiser's arguments are both irrelevant and incorrect:

Contrary to Kaiser's unsupported and ill-conceived argument, the cause for delay inherent in the judicial process is *irrelevant*, unless bad faith by the parties is shown,[9] which neither side has charged.[10] The wronged victim, not the adjudicated wrongdoer, is

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Indeed, one case relied on by Kaiser, *Blasini-Stern v. Beech-Nut Life Savers Corp.*, 429 F. Supp. 533 (D. Puerto Rico 1975), was noted by the advisory committee on amendments to Rule 67 as an example of a court improperly interpreting the intent of Rule 67. Fed. R. Civ. P. 67, Advisory Committee Notes, 1983 Amendment.

[9] As Kaiser notes in its Response at 28, Plaintiffs do not seek any punitive payments for bad faith dilatory conduct under Fed. R. App. P. 38, but rather seek full return of an accurate measure of the actual time value of money under Fed. R. App. P. 37. Both Rule 37 and Rule 38 present aspects of interest awards under 28 U.S.C. §1912, not 28 U.S.C. §1961.

[10] Kaiser has not even attempted to claim that Plaintiffs engaged in *any dilatory conduct. Cf. Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174 (1884) (laches by plaintiff waiting 25 years to collect on verdict barred interest on the verdict otherwise appropriate).

Although the causes for delay are irrelevant, the record shows that Kaiser (by filing voluminous motions, the bulk of which were denied), compounded by the District Court (in taking 2 years to rule), were responsible for the delays. Plaintiffs did not file *any* post-trial motions, and instead fought to sustain and collect on the initial liability and judgment in 1979, *which turned out to have been $4 million too low.*

entitled to the time value of money over periods of delays in the judicial process.[11]

Moreover, every delay in this protracted litigation is attributable to unsuccessful motions by Kaiser, including: (1) its 1977 motion for directed verdict granted by the District Court, but overruled by the Court of Appeals in 1978; (2) its 1979 post-trial motions denied as to liability, but granted to allow a new trial on damages in which a higher amount was awarded;[12] and (3) its 1981 post-trial motions granted in part by the District Court, but overruled by the Court of Appeals in 1984. In 1979, Kaiser asked for and took the risk of a new trial limited to damages only, and the practical result was that the 1979 trial and judgment actually had been fair to Kaiser, but had resulted in a trebled award $4 million too low.[13]

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[11] *See* Plaintiffs' Opening Brief at 13-17; Note, *Interest on Judgments in the Federal Courts*, 64 Yale L.J. 1019, 1048 (1955).

[12] Although Plaintiffs believe the District Court was incorrect in granting a new trial on damages because Plaintiffs' evidence on damages in 1979 was sufficient under *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264-265 (1946), and *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 122-125 (1969), to sustain the award and was not contradicted by *any evidence* from Kaiser, – that issue is irrelevant.

Kaiser's request to deny interest over the 2 years the District Court took to decide its motions is, in effect, an objection to the very procedure it requested, under which a second jury would and did recalculate what the correct award should have been as of 1979, based on the 1979 jury's liability findings and the liability evidence from the 1979 trial.

On the retrial, the 1981 jury conclusively determined that the appropriate award as of 1979 should have been even higher than the 1979 jury had found. Kaiser requested this bifurcated procedure, not Plaintiffs, and – as stated by the District Court – Kaiser "should not be permitted to object to the procedure itself just because its outcome is not to their liking." (J.A. 155).

[13] Kaiser's suggestion of any variance between damage evidence at the 1979 trial and the 1981 trial is wrong on the record (J.A. 129), and is precluded by the Court of Appeals' rejection of Kaiser's contentions hat the evidence at the two trials varied (J.A. 198-200).

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Fault for delay is irrelevant. Kaiser cannot escape payment of 2½ years of interest because of the 2 years the District Court took to rule on Kaiser's own post-trial motions.

3. KAISER'S UNSUPPORTED CONTENTION THAT COURTS LACK AUTHORITY TO AWARD INTEREST FROM THE ORIGINAL DATE LIABILITY WAS FIXED: Kaiser Irrationally Argues That The Court Of Appeals Cannot Award Interest From The Date Of A 1979 Judgment That Was Never Vacated As To Liability

(a) Kaiser Cites No Decisions Of This Court Denying Interest

Kaiser, in an inequitable twist of logic, argues in its Response at 13 that four of this Court's decisions *allowing* interest from the original judgment on a reduced amount (i.e., where the amount of the judgment is *reduced* on appeal), support a *denial* of interest in the present case, even though the amount of the original judgment was *increased* on the same liability finding.

Kaiser's argument makes a mockery of the reasoning of Mr. Justice Holmes in *De La Rama v. De La Rama*, 241 U.S. 154, 159 (1916), which supports Plaintiffs' position that: Plaintiffs are entitled to interest from the original judgment in 1979 because (in the words of the Court) "that was the date at which but for delays of the law [Plaintiffs] would have received their dues, [and Defendants have] had the use of the money meanwhile * * * ." *See* Plaintiffs' Opening Brief at 20 & n.30.

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Kaiser incorrectly suggests (Response at 16, n.11), without citation to the record, that one portion of Plaintiffs' damages "included an element of damages for the period following May 31, 1977." That statement is expressly contradicted by the record and the evidence at both the 1979 and 1981 trials. At both trials, Plaintiffs' expert used a discount factor to measure diminution of the value of the business as a going concern as of May 31, 1977. See Plaintiffs' Pretrial Statement Re: Damages, District Court Docket Entry No. 470; J.A. 129.

As Mr. Justice Holmes postulates, the Plaintiffs are entitled to interest on that amount which the court *ultimately* determines was properly due *from the beginning*. If the amount is less than originally awarded, interest runs on the reduced amount. Conversely, if based on the *same* liability finding, it is determined that a larger sum was due; the logic of Mr. Justice Holmes compels an award on the increased amount from the original date liability was fixed. Plaintiffs' Opening Brief at 29-30.

Kaiser's contention seeking to deny interest from the original judgment in 1979 (never vacated as to liability) because the original damage award was vacated and retried (Kaiser Response at 13-14), disregards this Court's rule that in awarding interest from the original judgment, "[e]quity regards the substance and not the form." *Kneeland v. American Loan & Trust Co.*, 138 U.S. 509, 511-512 (1891).

The substance of events between 1979 and 1981, was:

(1) Kaiser asked for a retrial of the amount of damages measured as of 1973 to 1977, hoping to do better by offering its own evidence it had failed to present in 1979,

(2) the court (after waiting 2 years to rule) granted Kaiser's request for a retrial of damages only, and

(3) the 1981 jury reaffirmed and even increased the 1979 jury's damage award conclusively establishing, based on the 1979 liability finding and evidence, that the 1979 multimillion dollar judgment had been $4 million too low.

Kaiser fails to state any meaningful distinction between the present case and this Court's decisions *allowing* interest from the date of the original judgment, and cites *no authority whatsoever from this Court denying such interest.*

(b) Kaiser States No Basis To Disregard The Overwhelming Majority Rule That Interest Runs From The Date Of The Original Judgment (1979)

Kaiser argues, without any basis in logic or policy, that three Court of Appeals decisions (cited and relied upon by

Plaintiffs) allowing interest from the date of *vacated* original treble-damage antitrust judgments were wrongly decided. Kaiser Response at 20-21.

To the contrary, in carrying out the fourfold purposes of interest, the foregoing three decisions, – two of which were joined in by Mr. Justice Kennedy, who was then a member of the Ninth Circuit,[14] – are not only correct, but are also consistent with the overwhelming weight of authority in the Courts of Appeals, including an opinion written by Mr. Justice Blackmun when he was a member of the Eighth Circuit.[15] *See* Plaintiffs' Opening Brief at 24 & n.36.

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[14] *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980).

[15] *1st Cir.: Clifford v. M/V Islander*, 882 F.2d 12, 1989 U.S. App. LEXIS 11643, *8 (1st Cir. 1989) (interest from original judgment, despite subsequent vacation and remand of damage award); *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971) (interest from date of original liability judgment in 1969, despite vacation, remand and subsequently recalculation of treble damages).

2d Cir.: Cf. Chemical Bank & Trust Co. v. Prudence-Bonds Corp., 213 F.2d 443, 444-45 (2d Cir.) (step-up of principal amount), *cert. denied*, 348 U.S. 856 (1954). Plaintiffs' Opening Brief at 29-30.

3d Cir.: Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 927 (3d Cir. 1985) ("interest on the amount of the recalculated award from the date of [the] original order allowing the award"); *Mascuilli v. United States*, 383 F. Supp. 50 (E.D. Pa. 1974) (interest from correct entry of liability in 1968, despite two later reversals and remands on damages), *aff'd*, 519 F.2d 1398 (3d Cir. 1975). Plaintiffs' Opening Brief at 21-22 & n.32, 26-30.

4th Cir.: Cf. The Kia Ora, 252 Fed. 507, 511 (4th Cir. 1918) (interest on increased amount from date of modified original judgment).

5th Cir.: In re Incident Aboard the D/B Ocean King, 877 F.2d 322, 323-24 (5th Cir. 1989) (interest from original judgment despite two intervening reversals, remands and recalculations); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 624 (5th Cir. 1988); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 545 (5th Cir. 1983).

6th Cir.: Bailey v. Chattem, Inc., 838 F.2d 149, 150, 154 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Petition of United States Steel*

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Kaiser totally ignores this authority expressly contradicting its position. Interest on the judgment should be awarded from the date of the original judgment establishing liability, even where that original judgment has been wholly or partially vacated as to damages.

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Corp., 479 F.2d 489, 508 (6th Cir.) (interest from original judgment where original awards had been vacated, remanded and recalculated), *cert. denied*, 414 U.S. 859 (1973).

7th Cir.: Compare Merit Ins. Co. v. Leatherby Ins. Co., 728 F.2d 943, 945 (7th Cir. 1984) (interest from original judgment vacated and reinstated on same liability finding), *with Needham v. White Laboratories, Inc.*, 847 F.2d 355, 361-62 (7th Cir. 1988) (no interest from original judgment where liability was retried); *see also Water Technologies Corp. v. Calco Ltd.*, 714 F. Supp. 899, 910 (N.D. Ill. 1989) (interest on fee award from original award despite remand by Fed. Cir. for recalculation).

8th Cir.: Cf. Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc., 416 F.2d 207, 213 (8th Cir. 1969) (interest credited on counterclaim from date of original judgment to offset interest on plaintiff's judgment although counterclaim was reversed and remanded for retrial) (opinion by Mr. Justice Blackmun, then a member of the Eighth Circuit).

10th Cir.: Northern Natural Gas Co. v. Hegler, 818 F.2d 730, 737-38 (10th Cir. 1987) (interest on judgment should commence as of the original 1974 liability judgment, despite reversal and recalculation of damages), *cert. dismissed*, 109 S. Ct. 28 (1988).

11th Cir.: Cf. Georgia Association of Retarded Citizens v. McDaniel, 855 F.2d 794, 799 (11th Cir. 1988) (interest on modified award of costs from date of vacated original judgment).

D.C. Cir.: Lopez v. Rodriguez, 668 F.2d 1376, 1381 (D.C. Cir. 1981) (interest from date of original judgment despite remand to recalculate damages).

Fed. Cir.: Cf. Mathis v. Spears, 857 F.2d 749, 760 (Fed. Cir. 1988) (interest from judgment establishing liability for fees, not from subsequent date of calculation).

(c) The Single Lower Court Decision Cited By Kaiser To Support Denial Of 2½ Years Of Interest On A Multimillion Dollar Judgment Has No Bearing On The Facts Or Legal Issues In This Case

Kaiser incorrectly argues that this case should be controlled by a decision of the Seventh Circuit under Illinois law in *Needham v. White Laboratories, Inc.*, 847 F.2d 355 (7th Cir. 1988), in which the court expressly refused to consider the appropriate interest as a matter of federal law or 28 U.S.C. §1961 and instead held that an Illinois statute prohibited interest over the period between two *separate* trials on *liability*, not damages. That case is entirely distinguishable from the present case on its facts and the law.[16] *Kaiser's Response cites no other case denying interest for the period after entry of the original judgment in a civil action.*

4. KAISER'S MISLEADING CONTENTION THAT INTEREST ON THE JUDGMENT SHOULD BE GOVERNED BY STANDARDS FOR *PRE*JUDGMENT INTEREST WHICH IS NOT EVEN SOUGHT: Plaintiffs Seek Interest On The Judgment From The Date Of The 1979 Judgment – Not *Pre*judgment Interest For The Six-Year Period From 1973 to 1979

Kaiser incorrectly postulates that interest for the period after establishment of liability and entry of the original judgment in 1979 should be governed by standards for prejudgment interest.

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[16] First, in *Needham* the time period involved preceded the liability judgment that was not thereafter disturbed. Kaiser fails to address Plaintiffs' Opening Brief at 25-26 n.37, which demonstrates why the undisturbed liability established in 1979 in the present case makes a much stronger case for interest from the original judgment than either *Handgards* or *Needham*.

Moreover, the *Needham* court felt bound in that diversity action by a state statute which prohibited interest, 847 F.2d at 362; and the court refused to consider the effect of 28 U.S.C. §1961 or other federal court authority for interest because neither party raised those issues, 847 F.2d at 361.

Plaintiffs have not sought *pre*judgment interest for the six-year period before entry of judgment in their favor (1973-1979).[17] Plaintiffs are seeking only interest on the judgment from the date of their original judgment in 1979,[18] which established liability and was the basis for the 1981 recalculation of damages. *See generally Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987) (interest on judgment, not prejudgment interest, ran from date of original 1974 judgment even though vacated and damages recalculated), *cert. dismissed*, 109 S. Ct. 28 (1988); *see also* Plaintiffs' Opening Brief at 20 & n.28.

5. KAISER'S MERITLESS CONTENTION THAT COURTS LACK POWER TO PRESERVE THE INTEGRITY OF THEIR JUDGMENTS: Kaiser's Argument That 28 U.S.C. §1961 Limits The Power Of Appellate Courts To Award Appropriate Interest Is Contradicted By The Language And Equity Of The Statute And By This Court's Holdings

Kaiser has utterly failed to establish that 28 U.S.C. §1961 prohibits the Courts of Appeals from awarding adequate interest at the commercial market cost of money to preserve the

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[17] Kaiser cites three entirely inapplicable lower court cases for the proposition that Plaintiffs should not be entitled to interest after the original 1979 judgment. Kaiser Response at 17. None of those cases has any relevance to the issues on certiorari because they involved requests for *pre*judgment interest over the period *prior* to entry of the original judgment in favor of the plaintiffs. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 561 (7th Cir. 1986); *Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 638 F.2d 661, 663 (3d Cir. 1981); *TWA, Inc. v. Hughes*, 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other issues*, 409 U.S. 363 (1973).

[18] Kaiser misleadingly cites *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987), for the irrelevant proposition that prejudgment interest "serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered," without acknowledging that Plaintiffs are seeking something entirely different, – i.e., interest on the judgment *for the period after entry of the original judgment in their favor (1979)*, not prejudgment interest for the six-year period (1973-1979) up to entry of the original judgment.

value of judgments that Court enters.[19] To the contrary, as pointed out in Plaintiffs' Opening Brief at 35-36 & n.55, and ignored by Kaiser,[20] §1961(c)(4) specifically exempts judgments of Courts of Appeals from its scope to ensure that §1961 does not encroach on the inherent and equitable power of the Courts of Appeals and the co-equal statutory provisions for interest on federal appellate court judgments under 28 U.S.C. §1912 and Fed. R. App. P. 37 & 38.

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[19] Contrary to Kaiser's mischaracterizations of the record and the issue presented (Kaiser Response at 27), Plaintiffs seek *interest on the Court of Appeals' judgment* of December 27, 1984. *See* Brief for Respondents on Kaiser's Petition in No. 88-1595 at 5-6.

Kaiser contends (Kaiser Response at 27) that 28 U.S.C. §1912 does not grant power to award interest in the present case because the December 27, 1984 judgment of the Court of Appeals was not an "affirmance" of any earlier judgment.

That contention is a blatant mischaracterization of the record: The Court of Appeals affirmed the 1979 liability, and the express language of the Court of Appeals 1984 judgment "*affirms*" the 1981 judgment (J.A. 210), which is in turn composed of the 1979 liability finding and the 1981 damage recalculation. The facts conclusively established in the 1981 damage recalculation reaffirmed the 1979 damage calculation. In form, as well as substance, Kaiser's arguments are contradicted by the record.

[20] Rather than distinguishing the *specific interest authorities* relied upon by Plaintiffs, Kaiser ignores the conceded purposes behind interest awards and argues that other inapplicable policy concerns prohibit the Court from carrying out the purposes behind interest awards.

For example, Kaiser's Response at 25-27 relies heavily on *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975) (no common law right to attorneys' fees), although neither the holding nor the principles discussed in that opinion support the denial of adequate interest:

(1) interest was not at issue in *Alyeska*;

(2) the interest award sought by Plaintiffs is consistent with the Clayton Act and Fed. R. App. P. 37, 28 U.S.C. §1912, and 28 U.S.C. §1961(c)(4);

(3) interest to preserve the value of judgments and the efficacy of court-ordered relief is within the inherent power of the court,

(Continued on following page)

Kaiser's Response does not even attempt to rebut or refute the existence of at least seven separate bases for appellate court power to award "interest in the exercise of its discretionary power to award proper relief, [as opposed to] deciding what §1961 allows." Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1042 n.118 (1955) (quoted in Plaintiffs' Opening Brief at p. 30 n.43 & p. 33 n.52).[21]

(Continued from previous page)

and federal common law favors interest awards, whereas it does not favor attorneys fee awards without express statutory authority such as 15 U.S.C. §15.

Other cases such as *Mansell v. Mansell*, 109 S. Ct. 2023 (1989); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (express statutory prohibition of procedure sought); *Thomas v. Arn*, 474 U.S. 140 (1985); and *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), relied upon by Kaiser, have nothing whatsoever to do with interest awards or the issues in this case.

[21] 1. *Inherent power* of courts to award adequate interest *to prevent irreparable harm* in conjunction with the courts' inherent power to stay execution on judgments. Plaintiffs' Opening Brief at 33-34.

2. *Inherent power* of courts *to protect the efficacy of the relief they order.* Plaintiffs' Opening Brief at 32-33.

3. *Inherent power* of federal courts *to fashion remedies to correct a wrong* against a federally protected right. Plaintiffs' Opening Brief at 35 n.54.

4. *General equitable power* of federal courts to award interest warranted in equity. Plaintiffs' Opening Brief at 14-15, 36-40.

5. *Equitable power to award restitution* pursuant to the broad congressional grant of equity power in the Clayton Act, 15 U.S.C. §26. Plaintiffs' Opening Brief at 37 n.58.

6. *Statutory power pursuant to 28 U.S.C. §1912* for appellate court to award appropriate interest on affirming the 1979 liability finding and 1981 damage recalculation. Plaintiffs' Opening Brief at 36.

7. *Power under Fed. R. App. P. 37* to award appropriate interest, without limitation as to rate, and approved by Congress pursuant to the Rules Enabling Act, 28 U.S.C. §2072. Plaintiffs' Opening Brief at 40-41 & n.63.

Moreover, Fed. R. App. P. 37 expressly directs that Courts of Appeals' mandates "shall contain instructions with respect to the allowance of interest."[22] The Courts of Appeals retain discretion over the rate of interest[23] to carry out the fourfold purposes of interest awards.[24]

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[22] Kaiser ignores that Plaintiffs are seeking interest on a Court of Appeals judgment which is effectively within the inherent power of that court. *See generally Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948); Note, *Interest On Judgments In The Federal Courts*, 64 Yale L.J. 1019, 1042 n.118 (1955). Indeed, Plaintiffs sought recall of the Court of Appeals' mandate to award appropriate interest (J.A. 75-76), but the court below determined that the issues were appropriately raised by separate appeal (J.A. 76).

The present case involves Fed. R. App. P. 37, not 28 U.S.C. §1961, because the issue is interest on the Court of Appeals' 1984 judgment. The Court of Appeals, having decided the correct disposition of the case, appropriately should determine what interest is due under Fed. R. App. P. 37.

[23] *Cf. West Wisconsin Ry. Co. v. Foley*, 4 Otto (94 U.S.) 100, 103 (1876) (award under S. Ct. Rule should be adjusted to accurately "compensate to some extent for the loss which results from delay").

S. Ct. R. 49, which is not at issue in this case, still follows the old procedure similar to the District Court judgment interest provision in 28 U.S.C. §1961 before it was amended by the 1982 Federal Courts Improvement Act – *i.e.*, reference to state law. Under Pennsylvania law, restitutionary market rate interest should be recoverable rather than 6% simple. *See generally Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981); *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 69-70 (1989). *But cf. Ball v. Rolling Hill Hospital*, 359 Pa. Super. 286, 518 A.2d 1238 (1986) (rate for interest on judgments in Pennsylvania limited to 6% simple in non-restitutionary proceeding).

[24] The cases cited in Kaiser's Response at 28-30, attempting to limit the broad power conferred under Fed. R. App. P. 37, are inapposite because they all deal with local rules promulgated under 28 U.S.C. §2071, which - unlike Fed. R. App. P. 37 which was promulgated under 28 U.S.C. §2072 – are not submitted to Congress for approval. Rules promulgated under 28 U.S.C. §2072 supersede contrary laws. *See* Plaintiffs' Opening Brief at 41 & n.65.

Kaiser ignores or misconstrues the longstanding authority of this Court that federal appellate courts have the power to award interest on the judgment independent of 28 U.S.C. §1961.[25]

Kaiser's Response at 23-24, in support of its contentions, cites only *Pierce v. United States*, 255 U.S. 398, 406 (1921), which is entirely inapplicable to the present case because it involved a request for interest on a criminal fine over periods prior to any entry of a civil action judgment against any of the defendants before the Court.[26]

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[25] *Perkins v. Fourniquet*, 14 How. (55 U.S.) 328 (1852) (allowing interest on a decree in equity under 28 U.S.C. §1912); *Mitchell v. Harmony*, 13 How. (54 U.S.) 115, 147-149 (1851); *Boyce's Executioners v. Grundy*, 9 Pet. (34 U.S.) 275, 289 (1835); *cf. Texas v. New Mexico*, 482 U.S. 124, 132-133 n.8 (1987); *National Bank of Commonwealth v. Mechanics National Bank*, 4 Otto (94 U.S.) 437 (1876) (interest on award of Comptroller of Currency as if it were interest on a judgment, also exercising discretion to order appropriate *compounding* to reflect reality); *Amis v. Smith*, 16 Pet. (41 U.S.) 303, 311 (1842) (interest on judgment without any federal statutory authority).

[26] Moreover, the dicta Kaiser cites from the *Pierce* case, which was decided in 1921, has been superseded by the merger of law and equity and abolishment of common law pleading in 1938.

Kaiser argues this Court stated in *Pierce* that "at common law judgments do not bear interest." As this Court noted in *Perkins v. Fourniquet*, however, even though at common law a judgment does not necessarily carry interest, "damages may be recovered for the detention of the debt in an action on the judgment." 14 How. (55 U.S.) 328, 331 (1852).

Under modern Federal Rules of Civil and Appellate Procedure, those damages that always could have been recovered for detention of the debt in a separate action on the judgment can be awarded as interest by federal appellate courts. *See* Plaintiffs' Opening Brief at 34 & n.53.

6. KAISER'S REMARKABLE CONTENTION THAT PLAINTIFFS, NOT DEFENDANTS, ARE THE GREEDY ONES: Kaiser Does Not Dispute That Monthly Average Prime, Compounded Monthly, Is An Accurate Measure Of The Cost Of Money To Business Litigants

Kaiser's argument that Plaintiffs seek "overcompensat[ion]" by demanding commercial market rates turns this case on its head. Kaiser, overlooking that it benefitted at market rates by more than $18.5 million, makes the totally false and unsupported argument that Plaintiffs would have put their money in a savings account, rather than pay off their debts (at prime plus 2.5 points (J.A. 290)) or rebuild their destroyed business.[27] Moreover, had Plaintiffs simply placed the money in a sound investment fund, it would now be worth as much as from $34 to $120 million.[28]

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[27] Kaiser cannot seriously contend that a giant monopolist has the privilege to destroy small competitors and force them to place any capital they have in savings accounts rather than engaging in business enterprises. The original 1979 judgment was entered in favor of Columbia Metal Culvert Co., not its Transferees in Liquidation and Dissolution. *Compare* J.A. 91, *with* J.A. 146.

[28] For example, if Plaintiffs had invested $9,567,939 in the Fidelity Magellan Fund in 1979, a recognized respectable growth fund, the investment would be worth more than $120 million today. *See* Lipper Analytical Services, Inc., *Lipper-Mutual Fund Performance Analysis*, 2d Quarter Report 1989 ("Lipper"), p. 6; *see also* N.Y. Times, Sept. 17, 1989, at F8 (advertisement) ($10,000 invested in 1979 worth $126,000 in 1989). If they had invested in a mutual fund with average performance, Plaintiffs' $9,567,939 as of 1979 would now be worth:

- ¶ over $40 million according to the weighted index of all "growth funds" (324% increase from June 30, 1979 to June 30, 1989);
- ¶ over $40 million according to the weighted index of all "growth and income funds" (336% increase for same period);
- ¶ over $34 million according to the weighted index of all, more conservative, "balanced funds" (257% increase for same period).

Lipper, p.5.

Kaiser has not contested that monthly average prime rates, compounded monthly, are a conservative measure of its cost of money (J.A. 303-08). Contrary to Kaiser's suggestion that prime interest rates, compounded monthly, would overcompensate Plaintiffs, the overwhelming weight of authority, discussed in Plaintiffs' Opening Brief at 43-44, and which Kaiser fails even to acknowledge, holds that prime interest rates are a conservative objective measure of the cost of money to business litigants.[29]

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[29] Plaintiffs' Opening Brief at 43-44; *see also Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436-37 (7th Cir. 1989) (prime rate applies to prejudgment interest and ideally should govern interest on judgments as well; although court apparently received no arguments from parties on issues in the present case and applied T-bill rate under §1961); *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507 (11th Cir. 1987) (prejudgment interest and interest on judgment at "IRS prime," although court confused on provisions of §1961 and apparently received no arguments from parties on issues in the present case); *cf. In re Camino Real Landscape Maint. Contr., Inc.*, 818 F.2d 1503 (9th Cir. 1987) (interest based on debtors' cost of money, rather than floating monthly rates in amended 26 U.S.C. § 6621); *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987) (trial court had discretion to set interest at rates in accordance with the real world), *cert. dismissed*, 109 S. Ct. 28 (1988); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984) (discretion to pick state law rate that best carries out purposes of interest), *cert. denied*, 474 U.S. 819 (1985). *See generally Peterson v. Crown Financial Corp.*, 661 F.2d 287, 298 (3d Cir. 1981) (prejudgment interest at higher than legal rate in restitution action); Note, *The Postjudgment Interest Rate in Pennsylvania: Ignoring Reality For Too Long*, 23 Duq. L. Rev. 1083, 1088 (1985) (legal rate below market rate is a "bonanza" for judgment debtors and "a polite form of highway robbery from judgment creditors"); Reitz, *Interest on Judgments in Federal Litigation*, J.A. 224 (1986) (delay in payment of judgment is an involuntary loan and market interest rate is necessary to compensate plaintiff).

7. KAISER INCORRECTLY ARGUES THAT THE COURTS SHOULD IGNORE ECONOMIC REALITY: Recognition Of Economic Reality By Objective And Accurate Measure Of The Cost Of Money Is Within the Power Of The Courts Of Appeals To Carry Out the Fourfold Purposes Of Interest

Kaiser argues for a system in which delays in the judicial process can severely dilute the value of judgments, creating overriding incentives to delay and complicate litigation after an adverse judgment.

The Court of Appeals, having finally determined the appropriate final judgment in favor of Plaintiffs on the merits, has the power to award proper interest to adequately preserve that judgment against diminution due to loss of the time value of money over periods of post-trial and appellate proceedings. Neither 28 U.S.C. §1912 nor Fed. R. App. P. 37 place any arbitrary limits on the rate of interest to be awarded over periods of delay in the judicial process, and 28 U.S.C. §1961, taken in the context of appellate court interest provisions and § 1961(c)(4), does not even purport to limit the power of the Courts of Appeals to protect the full measure of the relief they order. Simply to protect the full measure of the relief they order, Courts of Appeals should exercise their inherent and equitable power where appropriate, as in cases such as this, to award commercial market interest to fulfill the fourfold purposes of interest awards, where failure to do so would result in severe diminution of the value of the judgment.

CONCLUSION

For the reasons stated in Plaintiffs' Opening Brief and in this Brief, Plaintiffs ask this Court to reaffirm the inherent and equitable power of the Courts of Appeals and their authority under Fed. R. App. P. 37 to award adequate interest to carry out the purposes of interest awards.[30]

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[30] Plaintiffs also incorporate the Conclusion of their Brief for Respondents on Kaiser's Petition in No. 88-1595.

Plaintiffs request that the Court remand to the Court of Appeals with instructions to award appropriate interest on $9,567,939 at monthly average prime rates (as reported by the Federal Reserve Bank), compounded monthly, from August 22, 1979 to the date of full payment of all principal and interest.

Respectfully submitted,

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No. 88-1595
No. 88-1771

In The

Supreme Court of the United States

October Term, 1989

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR JR.), and BARBARA K. CLISBY,

Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION OF CROSS-PETITIONERS, BONJORNO, ET AL. TO OPEN ORAL ARGUMENT AND, IN SUPPORT THEREOF, TO PRESENT TO THE COURT A SUMMARY OUTLINE OF ISSUES AND THEIR POSITION FOR USE IN DETERMINING THE ORDER OF ORAL ARGUMENT, UNDER SUPREME COURT RULE 38, AND TO FACILITATE QUESTIONING BY THE COURT AT ORAL ARGUMENT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR), and BARBARA K. CLISBY, Cross-Petitioners	:	No. 88-1595 (Kaiser's Petition)
vs.	:	No. 88-1771 (Plaintiffs' Cross-Petition)
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Cross-Respondents	:	(Consolidated for Purposes of Oral Argument on December 4, 1989)

MOTION OF CROSS-PETITIONERS, BONJORNO, ET AL. TO OPEN ORAL ARGUMENT AND, IN SUPPORT THEREOF, TO PRESENT TO THE COURT A SUMMARY OUTLINE OF ISSUES AND THEIR POSITION FOR USE IN DETERMINING THE ORDER OF ORAL ARGUMENT, UNDER SUPREME COURT RULE 38, AND TO FACILITATE QUESTIONING BY THE COURT AT ORAL ARGUMENT

Cross-Petitioners, Joseph A. Bonjorno, et al. ("Plaintiffs"), by their attorneys, Duane, Morris & Heckscher, and Henry T. Reath, senior counsel (who will present oral argument on their behalf), respectfully move Your Honorable Court to be permitted to open oral argument.

Plaintiffs seek leave to file with the Court the Summary Outline of Issues and Their Position, attached as Exhibit A:

¶ to assist the Court in determining, under Supreme Court Rule 38, which party will open argument on these Cross-Petitions;

- ¶ to facilitate the identification of issues and the positions of the parties in advance of oral argument; and
- ¶ to serve as a resource at oral argument to facilitate questioning by the Court.

In support of this Motion, Counsel for Plaintiffs states as follows:

1. On June 19, 1989 this Court granted the Cross-Petitions for Certiorari of Defendant Kaiser ("Defendant") and Plaintiffs, which have been consolidated for oral argument on December 4, 1989. Supreme Court Rule 38 provides that where there are Cross-Writs, "the Court will advise the parties which one is to open and close [oral argument]."

2. At issue on these Writs is the power of Courts of Appeals to award appropriate interest to a plaintiff, over an appropriate time period, to preserve the value of its award during delays in the judicial process where an initial damage award is recalculated at a later date and recovery is further delayed by post-trial motions and appeals.

3. Plaintiffs respectfully request that their Counsel be permitted to open oral argument, since the ultimate issue that this Court must address – the power of the Courts of Appeals to award appropriate interest (under Federal Rule of Appellate Procedure 37, as reinforced by equitable and inherent powers) – is presented in Plaintiffs' Cross-Petition.

4. Because of the volume of briefing and opinions on the issues presented (as noted below), and in support of this Motion, Counsel for Plaintiffs move to submit the

attached Summary Outline for use by the Court in determining, under Supreme Court Rule 38, the order of Oral Argument, and additionally, as a resource for the Court and Plaintiffs' Counsel, to facilitate questioning by the Court at oral argument.

5. This is a long and complex case, now in its sixteenth year, suit having been started in January, 1974. It has been heard before three juries, two different District Court judges, and has been before the United States Court of Appeals for the Third Circuit four times on appeals and once on a Writ of Mandamus. This Court had previously denied the Defendant's two prior Petitions for Certiorari filed in 1978 and 1985 before granting a Writ on the present Cross-Petitions.

The opinions on interest in the District Court and the Court of Appeals consist of a total of 77 reproduced pages, and Cross-Petitions for Certiorari and Replies, another 113 pages. Additionally, both sides have each filed three briefs for a total or an additional 211 pages.

6. Counsel for Plaintiffs earnestly believes and respectfully states to Your Honorable Court that, because of the importance of these issues and the extensive record and briefs, the attached Summary Outline serves several important purposes:

First, it will be of assistance to the Court under Supreme Court Rule 38 in determining the order of presenting opening arguments;

Second, it provides in one single, short document, a resource for the Court that identifies all the issues;

Finally, at oral argument, it will allow Plaintiffs' counsel to more effectively "emphasize and clarify the written argument appearing in the briefs theretofore filed," as provided under Supreme Court Rule 38 and will provide an effective way to save time and respond to questions by the Court.[1]

7. The attached Summary Outline is only a summary of the basic positions stated in Cross-Petitioners' three briefs, with footnotes that are cross-referenced to the briefs filed and opinions below. The Summary Outline contains no discussion, arguments or citation of cases not contained in Cross-Petitioners' three briefs filed with this Court.

Respectfully submitted,

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[1] Counsel is well aware that *"[t]he Court looks with disfavor on any oral argument that is read from a prepared text."* S.Ct.R. 38 (emphasis in original). The submission of the Summary Outline will allow counsel to avoid any lengthy oral summary and focus on responding to the specific concerns of the Court.

EXHIBIT "A"

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR), and BARBARA K. CLISBY, Cross-Petitioners	:	No. 88-1595 (Kaiser's Petition)
vs.	:	No. 88-1771 (Plaintiffs' Cross-Petition)
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Cross-Respondents	:	(Consolidated for Purposes of Oral Argument on December 4, 1989)

SUMMARY OUTLINE
OF
ISSUES AND POSITION OF CROSS-PETITIONERS
(Plaintiffs and Appellants below)

[Footnote references to briefs and court opinions are attached at the end of this outline.]

I. PRINCIPAL ISSUE BEFORE THE COURT:

In 1979, Kaiser's liability was established for having destroyed Plaintiffs' business. The amount of that liability was ultimately determined to be $9.5 million.

Since 1979, Kaiser has benefitted from the use of Plaintiffs' $9.5 million in an amount in excess of $18.6 million and has deprived Plaintiffs of that time value of money.

Plaintiffs seek an allowance of interest that will return to them that $18.6 million, whereas Kaiser seeks to retain the entire sum, except for one day's worth of interest.

II. PROCEDURAL HISTORY:

These are cross-petitions, by Plaintiffs and Defendant below, from an award of interest, on an underlying treble damage anti-trust award.

These appeals on which cross-writs were granted arose from Plaintiffs' 1986 Petition to the Court of Appeals for the Third Circuit for an allowance of interest, pursuant to Federal Rule of Appellate Procedure 37.[1]

III. THE TWO ISSUES BEFORE THE COURT: (1) TIME PERIOD AND (2) RATE OF INTEREST TO BE AWARDED.

1. TIME PERIOD During Which Interest Runs.

Where the Court of Appeals:

a) entered judgment in 1984,

b) reinstating a damage judgment entered in 1981,

c) that was based on a liability judgment in 1979, which the 1984 judgment also affirmed;

And where this Court denied certiorari in 1986,

When does interest begin to run?

a) From 1986 (after this Court denied certiorari on the substantive issues and Kaiser paid $9.5 million) as contended by defendant Kaiser?[2]

b) From 1981 (when the damages were fixed by the jury) as found by the Court below?[3]

c) From 1979 (when the liability judgment was entered) as Plaintiffs contend?[4]

III (continued)

2. RATE OF INTEREST TO BE AWARDED.

a) Courts of Appeals' Power to Award Appropriate Interest.

Do Courts of Appeals have power – as Plaintiffs contend[5] – to award an appropriate sum of interest, to preserve a damage award against loss in value, during delays in the courts?

Plaintiffs seek commercial market rate interest, monthly average prime, compounded monthly.[6]

b) The Federal Interest Statute for Calculating Interest on District Court Judgments.

If the sole authority for the Courts of Appeals to award interest is prescribed by the federal statute for calculating interest on District Court judgments (as found by the Court below and disputed by Plaintiffs)[7]

What statute applies?

1. The Repealed Statute, 28 U.S.C. §1961, in effect when the judgment was first entered (1979) – as found by the District Court[8] and contended here by Kaiser?[9]

   This statute provided for interest under state law (which Kaiser contends is 6% simple under Pennsylvania law)[10]

   or

2. The Current Statute, 28 U.S.C. §1961 as amended in 1982,[11] which was in effect when Plaintiffs' right to interest matured into a recoverable right (1986)[12] – as found by the Court below?[13]

   This statute provides for a fixed, non-fluctuating Treasury Bill rate compounded yearly.

IV. PLAINTIFFS' POSITION ON TIME PERIOD

Interest Should Run From The Date Liability Was Established (1979) Where The Final Award Of Damages Was Based On Facts Established In That Liability Finding.

1. The 1979 judgment was composed of 2 parts:

   a) The jury's verdict of liability which was never set aside, and which provided the factual basis for the 1981 damage award in an increased amount[14]

   and

   b) The damage award (which was set aside for a new trial limited to recalculation of damages as of 1977).

   Thus interest should run from the date when it was first judicially determined (1979) that defendant had intentionally damaged Plaintiffs.[15]

2. **Liquidated v. unliquidated damages:** The statements by the Court below that interest cannot run on an unliquidated amount[16] were in error and contrary to rulings of this Court.[17]

3. **Changes in amount of damages only:**

   a) Decrease in amount. This Court has held in *De La Rama* and other cases[18] that where the amount of recovery is reduced on appeal, interest runs on the recalculated amount from the original date when liability was established.

   b) Increase in amount. A fortiori, when the amount is increased, interest should run from the original date of liability.[19]

   The overwhelming majority of decisions by lower courts have so held.[20]

IV (continued)

4. **Stopping or reducing the running of interest:** Once liability was established, or at any time thereafter, defendant Kaiser could have stopped or reduced the running of interest by: (1) tendering into court;[21] or (2) paying Plaintiffs what it believed it owed.[22]

5. **The equities and four-fold purposes of interest reinforce Plaintiffs' position:**[23]

   a) Defendant has had the use of Plaintiffs' money since their liability was determined in 1979;

   b) Plaintiffs have been deprived since that date of the value of their award by an amount equal to defendant's benefit;

   c) Public Policy: It is against sound public policy and efficient court administration to allow and encourage parties to benefit financially from delays, while they exhaust their post-judgment judicial remedies.[24]

6. **Judicial errors or delay:** But for errors in law, or delays by the District Court judges in this case, Plaintiffs would have recovered their treble damage award as early as:

   a) 1977, (long before the date they are now claiming interest should begin to run), had the first judge not mistakenly directed a verdict for defendant;[25] or at least

   b) late 1979, had the second judge, instead of delaying two years,[26] promptly decided defendant's post-trial motions and scheduled the re-trial on damages

V. PLAINTIFFS' POSITION ON RATE TO BE AWARDED

A. Courts Of Appeals Have Power To Award Appropriate Interest To Preserve The Value of Their Orders, Judgments Or Awards They Reinstate.

1) **Policy considerations**: To vindicate the four-fold purposes of interest,[27] Courts of Appeals cannot be denied the power (inherent and/or equitable) to award appropriate interest on their judgments, or those they reinstate.[28]

2) **Sound Judicial Administration – Eliminate incentives for gain from delay**: Sound judicial administration requires that the courts be able to eliminate incentives for delay and financial gain by litigants exhausting their judicial remedies, where the interest awarded against them would be less than the time value of money.[29]

   This consideration was first recognized by the President of the United States in early 1979,[30] and later by the Congress in 1982, when it amended the old statute (28 U.S.C. §1961) for District Court judgments.[31]

3) **Rule 37 and §1912 Power**: The Courts of Appeals have power to award appropriate interest pursuant to Fed.R.App.P. 37 and 28 U.S.C. §1912.[32]

4) **Rule 37 and §1912 power – no conflict with federal District Court interest statute**: The Courts of Appeals' power to award appropriate interest (commercial market rates) does not conflict with the §1961 which is designed as a rule of convenience for calculating interest on judgments routinely entered in District Courts.[33]

V.A.4 (continued)

28 U.S.C. §1961 as amended, subsection (c)(4), by its terms specifically does not "affect the interest on any judgment of any court not specified in this section."[34]

5) **Equitable and inherent power**: This Court has recognized that Courts of Appeals possess equitable[35] and inherent[36] powers to award appropriate interest[37] to do justice among the parties.

6) **Shortcomings of the Federal District Court Interest Statute**: The Court's power to award interest under Fed.R.App.P. 37 and 28 U.S.C. §1912 provides an important remedy to Courts of Appeals, because of major shortcomings in the statute for District Court judgments, 28 U.S.C. §1961.

   This is particularly so in long delays occasioned by the appeals process, where interest is awarded on reinstated or altered judgments over periods during which the Plaintiff is precluded from collecting on the judgment:

   First, §1961, being a rule of convenience, uses a fixed, rather than a floating rate – at Treasury Bill rates (2-3 points below prime) and compounded only yearly.[38] This difference in rates and compounding results in a significant shortfall from commercial market rates faced by business litigants.[39]

   Second, using the fixed rate can result in arbitrary and erratic swings. For example, in this case, as little as a 2 day difference in fixing the rate can cause a swing of as much as $4 million in interest.[40]

V.A (continued)

7) **Appropriate interest – commercial market rates**: The Court below should have exercised its power to award commercial market rates (prime, compounded monthly)[41] because:

a) Defendant's benefit: Defendant had the use of Plaintiffs' money since 1979, at market rates (in excess of $18.6 million).[42]

b) Plaintiffs' loss: Plaintiffs' cost of money was 2.5 points over prime, compounded monthly.[43]

Furthermore, had Plaintiffs received and invested the sums owed when due – not at Treasury Bill or savings account rates (as contended by defendant),[44] but in well-established, respected balanced or growth stock fund – the award could have appreciated to a sum worth today from 34 to 120 million dollars.[45]

B. **Defendant's Contentions That The Old, i.e., Repealed Version Of 28 U.S.C. §1961 (That Looks To State Rates) Applies To This Case Are Without Merit:**

1. **Appellate Court Power to Award Adequate Interest:** As discussed above, 28 U.S.C. §1912, Fed.R.App.P. 37, and the inherent and equitable powers of the courts mandate an award of interest adequately measuring the time value of money.[46]

2. **No retroactivity issue:** There is no issue of retroactive application of any law, as defendant contends,[47] where the right to recover is not determined (1986) until after the amended law takes effect (1982).[48]

V.B (continued)

3. **The *Bradley* Rule – Irrelevant:** The *Bradley* rule applying current law is not relevant where there is no change in law from the date of vesting to the date of decision (i.e. where the right to recover interest does not arise until after the amended law takes effect).[49]

4. **The *Bradley* Rule, if applicable:** would mandate following current law since defendant has not established a Congressional intent not to apply the repealed law, or manifest injustice if current law is applied.

a) No Congressional intent: No statutory direction or legislative history suggests that current law should not be applied.[50]

b) No manifest injustice: defendant's claims of manifest injustice are insufficient in law,[51] and devoid of facts[52] to support any such findings.

NOTES TO CROSS-PETITIONERS' OUTLINE

[1] Opinion of the Court of Appeals for the Third Circuit below, reprinted in Kaiser Petition for a Writ of Certiorari in No. 88-1595 ("Kaiser Pet.") A-7, 865 F.2d at 568; Brief for Respondents on Kaisers' Petition in No. 88-1595 ("Plaintiffs' Red Br.") at 5 & n.5; Reply Brief for Plaintiffs as Cross-Petitioners in No. 88-1771 ("Plaintiffs' Yellow Br.") at 12 & n.19.

The briefs filed in this Court are referred to as Kaiser's or Plaintiffs' "Blue," "Red" or "Yellow" to denote the color of each brief's cover pursuant to Supreme Court Rule 33.

[2] Brief for Petitioners in No. 88-1595 ("Kaiser Blue Br.") at 42.

[3] Kaiser Pet. A-14, 865 F.2d at 872; Plaintiffs' Blue Br. at 35-36.

[4] Plaintiffs' Blue Br. at 17-30; Plaintiffs' Yellow Br. at 2-11.

[5] Plaintiffs' Blue Br. at 14-15, 31-41; Plaintiffs' Yellow Br. at 11-15.

[6] Plaintiffs' Blue Br. at 7 n.11, 17, 41-45 & nn.71-72, 47; Plaintiffs' Yellow Br. at 17 & n.29, 19.

[7] Kaiser Pet. A-14 n.11, 865 F.2d at 872 n.10; *cf.* Plaintiffs' Blue Br. at 32-36.

[8] Kaiser Pet. A-45-50.

[9] Kaiser's Blue Br. at i.

[10] Kaiser Pet. A-15 n.12; 865 F.2d at 572 n.11.

[11] Kaiser Pet. A-23, 865 F.2d at 576.

[12] Plaintiffs' Red Br. at 14-20.

[13] Kaiser Pet. A-17-22, 865 F.2d at 573-76.

[14] Plaintiffs' Blue Br. at 3-5; Plaintiffs' Yellow Br. at 2-5.

[15] Plaintiffs' Blue Br. at 17-26 & nn.34, 36; Plaintiffs' Yellow Br. at 2-3, 6-9.

[16] Kaiser Pet. A-11, 12 & n.7, 865 F.2d at 570, 571 & n.6.

[17] Plaintiffs' Blue Br. at 19 & n.26; *Funkhouser; De La Rama; see also* Plaintiffs' Blue Br. at 27-28 (*Handgards*); *id.* at 29-30 (cases on changes in amount of award); Plaintiffs' Yellow Br. at 6-9 & nn.14-15.

[18] Plaintiffs' Blue Br. at 18-19 & n.25; Plaintiffs' Yellow Br. at 6-9.

[19] Plaintiffs' Blue Br. at 29-30; Plaintiffs' Yellow Br. at 6-7.

[20] Plaintiffs' Blue Br. at 24-25 n.36; Plaintiffs' Yellow Br. at 8-9 nn.14-15; *see also* Plaintiffs' Blue Br. at 20-22 & nn.31-32.

[21] Plaintiffs' Blue Br. at 5, 20 & n.29, 46; Plaintiffs' Red Br. at 3, 4-5 & n.4, 41 & n.49; Plaintiffs' Yellow Br. at 3 n.8.

[22] Plaintiffs' Red Br. at 3, 4-5, 41; Plaintiffs' Yellow Br. at 3 & n.8.

[23] Plaintiffs' Blue Br. at 13-17; Plaintiffs' Red Br. at 42-43; Plaintiffs' Yellow Br. at 1: the purposes of interest are to

- ¶ preserve judgments against diminution;
- ¶ prevent unjust enrichment of defendant at plaintiff's expense;
- ¶ vindicate the congressionally mandated policy to preserve free trade; and
- ¶ eliminate incentives for court delay after adverse judgments.

[24] Plaintiffs' Blue Br. at 16 & n.22, 43 n.70, 46; Plaintiffs' Red Br. at 42-43; Plaintiffs' Yellow Br. at 18.

[25] Plaintiffs' Blue Br. at 3, 18 n.23.

[26] *Id.* at 5 n.8; Plaintiffs' Yellow Br. at 4-6 & n.10.

[27] *See supra* n.23.

[28] Plaintiffs' Blue Br. at 31-41; Plaintiffs' Yellow Br. at 11-15.

[29] Plaintiffs' Blue Br. at 13, 16-17, 25-26, 33-34, 42-45; Plaintiffs' Yellow Br. at 18.

[30] Plaintiffs' Red. Br. at 34 n.39.

[31] *Id.* at 34.

[32] Plaintiffs' Blue Br. at 36, 40-41; Plaintiffs' Yellow Br. at 12 & nn.19-20.

[33] Plaintiffs' Blue Brief at 8, 35-36 & n.54, 38, 44; Plaintiffs' Yellow Br. at 12.

[34] Plaintiffs' Blue Br. at A-2; Plaintiffs' Yellow Br. at 12, 18.

[35] Plaintiffs' Blue Br. at 14-15, 36-40; Plaintiffs' Yellow Br. at 13 & n.21.

[36] Plaintiffs' Blue Br. at 14-15, 32-35; Plaintiffs' Yellow Br. at 13 & n.21.

[37] Plaintiffs' Blue Br. at 41-46; Plaintiffs' Yellow Br. at 15 & n.25.

[38] Plaintiffs' Blue Br. at 42-44.

[39] *Id.* at 8 & n.14; Plaintiffs' Yellow Br. at 16-18.

[40] *Id.* at 44 n.72; Plaintiffs' Red Br. at 48-49; Kaiser's Blue Br. at 10.

[41] The Court of Appeals below, without discussing Plaintiffs' request for market rate interest, dismissed it in a footnote as being "without merit." Kaiser Pet. A-14 n.11, 865 F.2d at 572 n.10.

[42] Plaintiffs' Blue Br. at 8 & n.14, 45; *see also* Plaintiffs' Yellow Br. at 16-17.

[43] J.A. 290-91; Plaintiffs' Blue Br. at 7 n.11; Plaintiffs' Yellow Br. at 16 & n.28.

[44] Kaiser's Red Br. at 16, 30.

[45] Plaintiffs' Yellow Br. at 2, 16 & n.28.

[46] Plaintiffs' Blue Br. at 47; Plaintiffs' Red Br. at 49.

[47] Kaiser's Blue Br. at 13-24.

[48] Plaintiffs' Red Br. at 14-20, 28-30.

[49] *Id.* at 14-15.

[50] *Id.* at 30-34.

[51] *Id.* at 35-42.

[52] *Id.* at 39-40.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners and Cross-Respondents,

v.

JOSEPH A. BONJORNO, LORRAINE KERR
(EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.),
and BARBARA K. CLISBY,
Respondents and Cross-Petitioners.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

OPPOSITION OF PETITIONERS TO RESPONDENTS' MOTION TO OPEN ORAL ARGUMENT AND TO SUBMIT "SUMMARY OUTLINE OF ISSUES AND POSITION OF CROSS-PETITIONERS"

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OPPOSITION OF PETITIONERS TO RESPONDENTS' MOTION TO OPEN ORAL ARGUMENT AND TO SUBMIT "SUMMARY OUTLINE OF ISSUES AND POSITION OF CROSS-PETITIONERS"

Petitioners Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser") oppose the motion filed by respondents and cross-petitioners Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.), and Barbara K. Clisby ("respondents") which they have entitled Motion of Cross-Petitioners to Open Oral Argument And In Support Thereof To Present To The Court A Summary Outline Of Issues and Their Position For Use In Determining The Order Of Oral Argument, Under Supreme

Court Rule 38, And To Facilitate Questioning By The Court At Oral Argument.

Putting aside the initial question of whether the Rules of this Court allow cross-petitioners to file an application such as this, Kaiser's opposition to the motion is two-fold. First, Rule 38 should not be construed in this case to permit respondents to open oral argument. Second, respondents' "motion" is in fact an unauthorized supplemental brief which should be rejected as contrary to the Rules of this Court.

A. This Court Should Not Permit Respondents To Open Oral Argument.

Supreme Court Rule 38 declares the general rule that the "*petitioner is entitled to open and conclude the argument.*" (Emphasis added). The Rule further provides that in the event there is a cross-writ of certiorari, "the Court will advise the parties which one is to open and close." *Id.* Kaiser urges this Court to apply the general rule here and to permit Kaiser to open and close oral argument.

Respondents assert that the issue presented in their Cross-Petition is "the ultimate issue that this Court must address. . . ." Motion at 2, ¶ 3. However, this so-called ultimate issue was presented to this Court in a *conditional cross-petition* in which respondents sought review of the Court of Appeals' decision *only if* Kaiser's initial Petition was granted. If the issue presented in the Cross-Petition was not important enough to warrant an *unconditional* cross-petition, it is obviously not the "ultimate issue that this Court must address," as cross-petitioners suggest in their motion. On the contrary, the primary issues before this Court are the propriety of retroactive application of amended §1961 and whether postjudgment interest may be awarded from a date prior to entry of judgment. These issues were presented in Kaiser's Petition and briefs. Moreover, as the *only* party to file an unconditional petition, Kaiser should be permitted to open and close oral argument, pursuant to the first sentence of Rule 38.

B. This Court Should Not Consider Respondents' Outline.

Respondents concede that this Court has already received 324 pages of briefs addressed to the issues in the Petition and Cross-Petition. Nevertheless, respondents now seek to submit additional argument in a 12-page document they have appended to their motion, entitled "Summary Outline Of Issues And Position Of Cross-Petitioners."

Respondents' "Summary" should be disregarded by this Court as it is simply a disguised supplemental brief which does not conform to the Rules. The explicit terms of Supreme Court Rule 35.5 provide that a party may submit a supplemental brief *only* when it "desires to present late authorities, newly-enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief." The "Summary" submitted by respondents cites to no "late authorities," refers to no "newly-enacted legislation," and presents no "intervening matters that were not available in time to have been included" in respondents' briefs. Indeed, respondents themselves state that the "Summary Outline contains no discussion, arguments or citation of cases not contained in Cross-Petitioners' three briefs filed with this Court." Motion, at 4, ¶ 7. The "Summary" is simply an unnecessary rehash of all respondents' prior briefs and should therefore be rejected.

Respectfully submitted,

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